IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,	:	
	:	
Petitioner,	:	**CASE NO. SC02-2272**
	:	
v.	:	
	:	
THE CITY OF WINTER PARK,	:	
	:	
Respondent,	:	
_____	:	

INITIAL BRIEF OF AMICUS CURIAE,
FLORIDA LEAGUE OF CITIES, INC.
IN SUPPORT OF RESPONDENT CITY OF WINTER PARK

FILED BY CONSENT OF ALL PARTIES

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STATEMENT OF INTEREST OF AMICUS CURIAE FLORIDA LEAGUE OF CITIES, INC.

The Florida League of Cities, Inc. (ALeague@) is a voluntary organization whose membership consists of some 405 municipalities and 5 charter counties in the State of Florida. The questions raised in this cause concern matters of utmost interest and concern to the membership of the League as the issues directly impact the ability of municipalities to execute their proprietary and regulatory powers. Franchises are widely employed by municipalities to regulate and manage the private use of public rights-of-way, as well as to set forth the terms and compensation for which a municipality will relinquish its right to provide electricity within its jurisdiction. The issues in this case call in to question the authority of municipalities to charge franchise fees to private entities that have been granted municipal property interests and who are making extraordinary use of the public rights-of-way for private gain.

SUMMARY OF THE ARGUMENT

In this case, the franchise agreement between the City of Winter Park (hereinafter Athe City@) and Florida Power Corporation (hereinafter AFPC@) expired while the parties negotiated a dispute over a new franchise agreement. Upon the expiration of the agreement, FPC continued exercising all of the rights and receiving all of the benefits that had been conferred under the agreement, but FPC refused to remit the 6% franchise fee required under the agreement to the City. The

6% fee represented consideration for the privileges granted to FPC under the franchise: the exclusive right to provide electric service within the City and the privilege of using the City=s rights-of-way as incident to that right.

The City is entitled to an injunction requiring FPC to continue paying the previously bargained for 6% franchise fee because it continues to enjoy the rights and privileges of the expired franchise. When a utility continues to exercise the rights conveyed under an expired franchise agreement, the agreement continues as an implied contract, and the utility must continue paying the fee established under the expired agreement. The City has a clear legal right to such relief because the franchise fee represents the bargained for value of the City=s lost proprietary right to be the exclusive provider of electric service, as well as a reasonable charge for FPC=s use of the City=s rights-of-way. This Court=s decision in *Alachua County v. State* does not dictate a different conclusion, as it has limited application under these circumstances.

ARGUMENT

I. A Utility That Continues to Benefit by Exercising Rights Conferred Under An Expired Franchise Agreement Must Continue Paying the Previously Negotiated Franchise Fee

This Court should resolve the instant conflict by finding that a utility company that continues exercising the rights and privileges conferred under a franchise agreement after such agreement has expired is obligated to continue paying the

previously negotiated franchise fee. Other than FPC=s refusal to pay the franchise fee, there is no evidence that either party is acting inconsistently with the obligations and duties of the expired franchise agreement. FPC continues to enjoy considerable benefits flowing from the franchise: it receives revenue from the sale of electricity within the City and it receives revenue from the lease of utility pole space to cable and telephone companies. Meanwhile, the City receives nothing. In this case, FPC=s and the City=s rights and obligations should continue under the terms specified in the expired franchise ordinance, including payment of the franchise fee, until the parties can resolve their dispute.

It is long established that where a franchise agreement expires but the utility continues to use the public streets and rights-of-way, an implied contract arises under the same terms and conditions as the expired franchise. *B-C Cable Company, Inc. v. City and Borough of Juneau*, 613 P.2d 616, 619 n. 5 (Alaska 1980); *City of Roswell v. Mountain States Telephone & Telegraph Co*., 78 F.2d 379, 386 (10th Cir. 1935); *Baker v. City of Topeka*, 644 P. 2d 441, 444-45 (Kan. 1982); *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va*., 140 S.E.2d 683, 686 (Va. 1965); *Village of Lakeville v. City of Conneaut*, 144 N.E.2d 144, 152 (Ohio Com.Pl. 1956); *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N.W. 1081, 1090 (Iowa 1902), *error dismissed*, 199 U.S. 600 (1905); *see also City and County of Denver, et al. v. Denver Union Water Co.*,

246 U.S. 178 (1918) (construing city ordinance adopted after expiration of franchise agreement as continuing the franchise between the city and the water company). The expired franchise agreement in such situations does not continue indefinitely. Rather, it continues until the parties are able to negotiate a new franchise, until the city constructs its own facilities and begins providing services, or until the city purchases the utility=s facilities through either eminent domain or under a Abuy back@ clause and begins providing its own services.

A continuation of the franchise as an implied contract is the most equitable resolution of the issue before this Court. To conclude otherwise would require this Court to terminate by judicial fiat the City=s long-held proprietary right to provide exclusive electrical services to its residents. *See* section II, *infra*. Because the City holds and exercises this right on behalf of City residents for their specific benefit, such an action would be tantamount to giving away public property. *See Leonard v. Baylen Street Wharf Co.,* 52 So. 718, 718 (Fla. 1910) (stating that all franchises belong to the government in trust for its people). The Court can avoid this quandary and preserve the substantial rights of both parties if it concludes the franchise agreement continues as an implied contract pending resolution of the parties= dispute.

II. A Municipality Has A Clear Legal Right to Compensation For its Lost Proprietary Right to Provide Exclusive Electric Services to Its Residents

FPC has appropriated a valuable right from the City without compensation. The right to a protected public monopoly that is granted via an exclusive municipal electric franchise is a valuable property interest. This property interest is conveyed by cities in exchange for specific consideration in the form of franchise fees. The City is entitled to continued payment of the 6% franchise fee based upon FPC=s continued appropriation of the City=s Apower to serve.@

Unlike counties, municipalities have long possessed the authority to engage in proprietary activities such as the provision of electrical service. Counties arose as pure political subdivisions of the state, created for the purpose of administering state power and authority at a local level. *Keggin v. Hillsborough County*, 71 So. 372, 372 (Fla. 1916); *see also City of Tampa v. Easton*, 198 So. 753, 754, 756 (Fla. 1940) (distinguishing counties from municipalities). In contrast, municipalities arose primarily for purposes of administering the local affairs of a particular community, for the special benefit and advantage of the persons within 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).

Like a county, a municipality acts in a public capacity when it acts as an arm of the state. Unlike a county,

however, a municipality acts in a quasi-private or proprietary capacity when it acts for the special benefit of its inhabitants. This has been described as the Adual@ or Atwofold@ power of municipalities. *Kaufman*, 94 So. at 698; *Hamler v. City of Jacksonville*, 122 So. 220, 221 (Fla. 1929); *Easton*, 198 So. at 756; *Rosen*, 10 So. 2d at 309; *Caldwell*, 75 So. 2d at 767.

Florida=s Constitution and the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes, expressly recognize the dual regulatory and proprietary powers of municipalities, as distinguished from counties. Article VIII, Section 2(b), of the Florida Constitution vests such governmental, corporate and <u>proprietary</u> powers in municipalities as to enable them to perform municipal functions and to render municipal services.

Likewise, section 166.021, Florida Statutes, provides:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and <u>proprietary</u> powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly provided by law.
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is further the intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or <u>proprietary</u> purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited . . .

Fla. Stat. ' 166.021 (2002) (emphasis added). Neither

Florida=s Constitution nor Chapter 125, Florida Statutes, concerning county government, specifies the words Aproprietary powers@ or Aproprietary purposes@ with respect to the powers of county government.

Courts have long recognized a municipality=s proprietary powers over its public property, including its streets and rights-of-way. 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. *See City of Winter Park v. Montesi*, 448 So. 2d 1242, 1244 (Fla. 5th DCA), *rev. denied*, 456 So. 2d 1182 (Fla. 1984); *see also Jacksonville Electric Light Co. v. City of Jacksonville*, 18 So. 677, 680-83 (Fla. 1895) (recognizing municipality=s right to provide electricity to its inhabitants, even in competition with a private company).

Likewise, the proprietary power of a municipality to serve its citizenry with utilities, such as electricity, is also long established. *See City of Lakeland v. Amos*, 143 So. 744, 745 (Fla. 1932); *Hamler v. City of Jacksonville*, 122 So. 220, 221 (Fla. 1929); *Kaufman v. City of Tallahassee*, 94 So. 697, 699 (Fla. 1922); *Keggin v. Hillsborough County*, 71 So. 372, 373 (Fla. 1916). As early as 1895, this Court recognized that a municipality had the right to provide electricity to its inhabitants, even in competition with a private company, and recognized that provision of electricity to municipal inhabitants served a municipal purpose. *Jacksonville Electric*

Light Co. v. City of Jacksonville, 18 So. 677, 682-83 (Fla. 1895).

It is similarly well established that municipalities have the authority to convey this proprietary Apower to serve@ to a utility company through an exclusive franchise agreement. *State ex rel. Buford v. Pinellas County Power Corp.,* 100 So. 504, 506-07 (Fla. 1924) (statutory authority of municipality to enter electric business implies the authority to enter into a franchise with a private company for the company to provide electrical service); *St. Joe Natural Gas Co. v. City of Ward Ridge*, 265 So. 2d 714, 715 (Fla. 1st DCA 1972) (gas distribution system as a proprietary activity that may be exclusively franchised), *cert. denied*, 272 So. 2d 817 (Fla. 1973). The supreme court of Ohio described the nature of this proprietary authority to franchise public utility service as follows:

> The word [franchise] is also often used with special reference to a privilege granted . . . to conduct a business of public utility, -- such, for instance, as supplying the public with water, light, transportation or other conveniences. It follows, then, without argument, that under the [city=s ordinance] the plaintiff obtained a privilege which may properly be called a Afranchise,@ in the common acceptance of that term; that is, the right or privilege of supplying the city of Cedar Rapids and its inhabitants with water, and of occupying the streets of the city for that purpose.

Cedar Rapids Water Co. v. City of Cedar Rapids, 91 N.W. 1081, 1083 (Iowa 1902) (emphasis added), *error dismissed*, 199 U.S. 600 (1905). The above excerpt aptly describes the twofold nature of the privilege that may be granted: the privilege to

provide a service that would ordinarily be provided by the municipality; and the right to occupy municipal rights-of-way incident to that grant.

Florida=s legislature has likewise long recognized that a municipality=s Apower to serve@ includes the right to provide electric service to its citizens, as well as the authority to franchise that right. The legislature authorized such powers as early as 1893. *See State ex rel. Buford v. Pinellas County Power Co.*, 100 So. 504, 507 (Fla. 1924). Immediately before Florida became a home rule state, section 167.21, Florida Statutes, provided in part:

> The city or town council may construct wharves, quays and docks . . . erect all necessary public buildings and control and dispose of the same as the interests of the city or town may require; make and sink wells . . . provide for the lighting of streets of the city or town; . . . .

Fla. Stat. ' 167.21 (1967) (emphasis added).

The advent of home rule did not affect the right of municipalities to provide electric service. With the advent of home rule, the legislature expressly recognized that municipal powers previously enjoyed under a specific grant of legislative authority, such as the proprietary authority to Alight the streets@ and to enter franchise agreements for the same, would continue under a municipality=s residual constitutional home rule powers even with the repeal of such express legislative authority. This is described in section 166.042, as follows:

> It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of chapters 167, 168, 169,

> 172, 174, 176, 178, 181, 183, and 184 of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

Fla. Stat. ' 166.042 (2002) (emphasis added).

Even with the adoption of vast regulatory schemes governing electrical utilities, municipalities in Florida have retained the right to provide their own electric services to their inhabitants without competition, and the authority to decide which private company may possess the franchise for such services. Section 366.11 provides:

> (1) No provision of this chapter shall apply in any manner, other than as specified in ss. 366.04, 366.05(7) and (8), 366.051, 366.055, 366.093, 366.095, 366.14, and 366.80-366.85, to utilities owned and operated by municipalities . . . when such municipality . . . is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.
>
> (2) Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise.

Fla. Stat. ' 366.11(2) (2002).[1] This Court has recognized that the regulatory scheme in Chapter 366 does not encumber municipalities as asserted by FPC and the amici. In *Storey v. Mayo*, this Court explained:

> The established state policy in Florida is to supervise privately-owned electric utilities through regulation by a state agency. By the same policy municipally-owned electric utilities are expressly exempted from state agency supervision. Fla. Stat. s. 366.11 (1967), F.S.A. . . . . 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. On the other hand, the rates and services of the privately-owned electric companies are regulated by the [Public Service] Commission.

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

A city=s exclusive Apower to serve@ its citizens with electricity is a proprietary interest that is distinct from its regulatory and proprietary interests in its streets and rights-of-ways. It is a significant property interest that cannot be recovered solely through regulatory fees or proprietary fees related to the use of its rights-of-way. As one authority has explained:

> when a local government grants a utility franchise it gives up a valuable opportunity to operate in a proprietary capacity. This is explicitly acknowledged in provisions that reserve the right of the franchisor to purchase the franchised operation under prescribed circumstances. In sum, therefore, a major element of many franchise fees should be a charge for the lost proprietary opportunity.

[1]Chapter 366 does not reference similar exemptions or authorities for counties.

* * * *

> the entire [franchise] fee thus subsumes amounts to defray regulatory costs, amounts to pay for services rendered to the franchisee by the franchisor, amounts to pay for rental of rights-of-way and property of the franchisor used by the franchisee, and an amount to compensate the franchisor for lost proprietary opportunity.

Center for Governmental Responsibility, Franchising and Licensing of Public Services in Florida, ' 1.07(D)(1) at p. 44 (1984). Essentially, cities that grant an exclusive franchise of their Apower to serve@ are conveying a protected public monopoly. This Court has recognized that the grant of a protected public monopoly is a valuable property right. *Greyhound Lines, Inc. v. Mayo*, 207 So. 2d 1, 4 (Fla. 1968).

In this case, the City chose to exclusively franchise its Apower to serve@ to FPC. *See* Winter Park Ordinance No. 991, ' 1. Incident to that grant, the City also granted to FPC the authority to use its rights-of-way. *See* Winter Park Ordinance No. 991, ' 2. Thus, under the franchise agreement, FPC was granted both the Apower to serve@ and the privilege of using the City=s rights-of-way. So long as FPC continues to enjoy the benefit of its bargain with the City, it is axiomatic that the City should likewise continue to enjoy the benefit of its bargain through payment of the 6% franchise fee.

III. A Municipality Has a Clear Legal Right to Compensation For the Extraordinary Use of Its Streets and Rights-of-Way for Private Gain

In addition to their proprietary Apower to serve,@ municipalities possess the home rule authority to charge fees

for the extraordinary use of public rights-of-way for private gain. The Florida Constitution and the Florida Municipal Home Rule Powers Act expressly recognize the regulatory and proprietary authority of municipalities to perform municipal functions and to render municipal services. Fla. Const. Art. VIII, ' 2(b); Fla. Stat. ' 166.021 (2002). Unless preempted by the legislature, municipalities possess regulatory and proprietary powers over public rights-of-way within their jurisdictions. No law preempts municipalities from charging proprietary and regulatory fees to an electrical utility that is using the public rights-of-way for private gain.[2]

Chapter 366, Florida Statutes, relating to electric and gas utilities, specifically recognizes the continuing authority of a municipality to exercise police powers over rights-of-way and the authority to receive revenue from any public utility. Fla. Stat. ' 366.11(2). The First District Court of Appeal has noted that the regulatory scheme in Chapter 366 does not preempt a government=s authority to require public utilities to pay franchise fees for their use of the government=s rights of way:

> The prevailing theme of chapter 366 involves the regulation of rates charged by electric utilities within the state; whereas the franchise fees in issue have no impact on the rates of the respective

[2]For other utilities, the legislature and congress have expressly limited the maximum rate that may be charged a utility as a condition of using the right-of-way. *See* Fla. Stat. '' 337.401(3)-(4) (prescribing a cap of 1% on the franchise fee to be charged to local telecommunications providers and a per linear mile cap on the fee charged to long distance providers); 47 U.S.C. 542 (limiting franchise fees paid by cable operators to 5%).

> utilities, in that the fees assessed are passed on to the customer . . . .

Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 100 (Fla. 1st DCA), *rev. denied*, 645 So. 2d 452 (Fla.), *cause dismissed*, *Escambia River Elec. Co-op., Inc. v. Santa Rosa County*, 641 So. 2d 1345 (Fla. 1994).

In *Alachua County v. State*, 737 So. 2d 1065 (1999), this Court did not overrule previous case law that recognized the authority of municipalities to charge a reasonable proprietary fee for an electric utility's use and occupation of municipal rights-of-way. The justification for such a fee stems from the extraordinary use that is being made of public property. The United States Supreme Court explained that

> The use which [a utility] makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public . . . . the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. If as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for the purposes of a highway and personal travel, wholly lost to the public.

City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99 (1893). That municipalities hold public rights-of-way in trust for the public underscores the fact that when a private company is using the public's property in an extraordinary manner for private profit, the public should be compensated.[3]

[3]The State of Florida holds sovereign lands in trust for the people of the State, but it also leases such lands to private entities for either a 6% fee or the rental value of

That is exactly what a proprietary charge to an electric utility accomplishes.

FPC=s and various amici=s exaggeration of footnote dicta in the *Alachua County v. State* decision should be rejected. The *Alachua* decision referenced footnote dicta in a federal district court opinion that questioned the rental concept as applied to telecommunications providers, and not electric utilities. *Alachua*, 737 So. 2d at 1068 n. 1 (citing *City of Chattanooga v. Bellsouth Telecomm., Inc.* 1 F. Supp.2d 809, 814 n.3 (E.D. Tenn. 1998)). It must be recognized that the *Chattanooga* decision, which turned on federal court jurisdiction under the Federal Tax Injunction Act and not franchise fees, is not controlling law in Florida. Another federal district court case **B** from Florida **B** affirms the authority of municipalities to impose rental charges for the use of municipal rights-of-way. *See Telestat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 406 (S.D. Fla. 1991) (noting city was clearly within its authority to charge 5% franchise fees for commercial use of public rights-of-way).

The *Alachua* decision is not as expansive as urged by FPC and various amici. The Court in that case prefaced its ruling on the undisputed facts before it. *Alachua*, 737 So. 2d at

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the land. Fla. Admin. Code R. 18-21.011. That the entity is providing a form of public benefit (such as a public dock or marina) or only private benefit is of no consequence to the payment of the fee. Similarly, a utility=s claim that it is providing a public service incident to its profit-making endeavor is of no consequence.

1066-67. There are numerous distinctions between those undisputed facts and the case at bar that limit the applicability of the *Alachua* decision. First, the *Alachua* decision did not involve a Aholdover@ franchisee and a franchise fee established by a previous contractual relationship. Second, this Court in *Alachua* did not address the misappropriation of a municipality=s Apower to serve@ because counties like Alachua have never possessed such a property interest. Third, Alachua County conceded its fee was unrelated to the reasonable rental value of the rights-of-way and that it greatly exceeded the county=s cost of regulation. Fourth, Alachua County=s ordinance specifically recognized that it was giving up no property rights and that the utilities already had the right to occupy the rights-of-way. *Alachua* 737 So. 2d at 1068. Fifth, the Alachua County ordinance specifically provided that the fees were intended to provide tax relief to ad valorem taxpayers. In the instant case, the City=s franchise ordinances do nothing of the kind.

Finally, while this Court found Alachua County=s argument that its fee was rent Aunconvincing,@ it did not invalidate a municipality=s authority to collect a reasonable proprietary fee for an electric utility=s use of municipal rights-of-way. Moreover, it did not invalidate the concept that a franchise fee based upon a percentage of utility revenues is reasonable. Courts have routinely upheld franchise fees based on a percentage of utility revenues. *See Santa Rosa County*, 635

So. 2d at 100; *City of Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976); *Telestat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 406 (S.D. Fla. 1991). Indeed, such a fee has been specifically recognized as approaching a reasonable market value of the rental of a city=s right-of-way when compared to franchise fees for other utilities.[4] *Telestat Cablevision*, 773 F. Supp. at 406. In this case, the City offered sufficient evidence that the 6% fee is reasonably related to the cost of regulating and maintaining the right-of-way, and that the 6% fee is a fair Amarket rate@ for FPC=s use of the City=s rights-of-way. (Record 3, p. 1056).

IV. A Municipality is Entitled to Injunctive Relief to Compel a Holdover Franchisee to Compensate It For the Continued Appropriation of Municipal Property Interests

Sections II and III, *supra*, establish that municipalities have a clear legal right to the continued payment of a franchise fee from a holdover franchisee. An injunction is appropriate to maintain the bargained-for relationship that existed during the term of the franchise agreements while the parties negotiate their dispute. In addition, an injunction is appropriate in this case to protect the City=s property interests.

Since the expiration of the franchise agreement, the City=s property interest in being the exclusive provider of electric service within its jurisdiction has been invaded by

[4]There are 64 franchise agreements between FPC and various Florida municipalities. All of them include a 6% franchise fee. (Record 3, pp. 0611-0613).

another entity without compensation. As a result, FPC enjoys a perpetual, exclusive and free public monopoly at the expense of municipal citizens who have a vested interest in their municipality=s returns on proprietary operations. An injunction will issue to protect valuable property interests associated with utility service. *See Tampa Electric Company v. Withlacoochee River Elec. Coop., Inc.,* 122 So. 2d 471 (Fla. 1960); *City of Pinellas Park v. Cross-State Utils. Co.*, 205 So. 2d 704, 706-07 (Fla. 2d DCA 1968). FPC has invaded a property interest held in trust for the citizens of the City. *See Leonard v. Baylen Street Wharf Co.,* 52 So. 718, 718 (Fla. 1910) (stating that all franchises belong to the government in trust for its people). Accordingly, injunctive relief is proper in this case to protect the City=s property interests that have been misappropriated by FPC.

CONCLUSION

Based upon the foregoing and upon the Answer Brief of the City of Winter Park, the Florida League of Cities requests this Court to conclude that municipalities have a continuing legal right to charge compensation for their lost proprietary right when an electric utility continues to provide services within a municipality following the expiration of the franchise, and that municipalities have a legal right to injunctive relief to protect their proprietary rights when an electric utility continues to make extraordinary use of municipal rights-of-way for private gain following the

expiration of the franchise.

Respectfully Submitted this ___ day of March 2003.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via U.S. Mail this _____ day of March, 2003 to:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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