IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,
a Florida corporation,

Petitioner,

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

vs.

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

Respondent.

______________________________/

ANSWER BRIEF OF CITY OF WINTER PARK, FLORIDA

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PRELIMINARY STATEMENT

The City of Winter Park was the Plaintiff below and will be referred to throughout this brief as "Winter Park" or "the City." Florida Power Corporation was the Defendant below and will be referred to throughout this brief as "FPC." Because the decision below was rendered in an appeal from a non-final order granting an injunction, the record before this Court includes a three volume appendix filed by FPC at the Fifth District Court of Appeal, and several supplemental documents that were inadvertently excluded from the appendix. All cites to the record (derived from FPC's appendix at the Fifth District Court of Appeal) will be in the form: "(R[appendix number] [page number])." All cites to Winter Park's appendix filed with this Court will be in the form: "(A[tab number] [page number])."

STATEMENT OF THE FACTS

The electrical system which currently serves customers in Winter Park was originally built by the City of Winter Park in 1913.(R1 51). In 1927, Winter Park sold the system to FPC's predecessor and entered into a franchise agreement allowing FPC's predecessor to use Winter Park's streets, roads and rights-of-way for constructing, operating and maintaining the electrical distribution facilities in Winter Park.(R3 582, 606). In exchange for the rights granted by Winter Park in

the franchise[1], FPC's predecessor agreed to pay Winter Park a franchise fee which was based on a percentage of the gross receipts from the sale of electricity in Winter Park. (R3 606, 1040). The franchise also granted Winter Park the right to buy back the electrical facilities at the expiration of the franchise. (R3 1040-1041). New franchises were granted to FPC in 1947 and 1971, and each franchise contained a buy back, or purchase option provision. (R1 51). Prior to 1999, Winter Park and FPC began negotiations for renewal of the electric franchise. The parties were unable to agree to the terms of the franchise because FPC refused to agree to a franchise agreement which contained a buy back provision, even though that provision had existed in every franchise with Winter Park since 1927 and even though FPC originally purchased the system from Winter Park. (R1 51-52). The 1971 franchise was briefly extended while the parties continued to negotiate a new franchise agreement. (R1 52). The extensions expired on June 12, 2001. (R1 15).

On June 8, 2001, prior to the expiration of the franchise extensions, Winter Park filed a declaratory judgment action seeking a declaration that it had the right to purchase FPC's electric distribution facilities in Winter Park and to

[1]Though slightly changing over time, these rights have always included both the right to provide electric service in the City and the right to use the City's rights-of way.

determine the value of such facilities by arbitration. Additionally, Winter Park sought, "[t]o order FPC to comply with all provisions of the Franchise, including the payment of franchise fees, for so long as FPC continues to utilize Winter Park rights-of-way."

(R1 3-4). Paragraph 9 of the Complaint also alleged "[u]nder Florida law, WINTER PARK is granted the authority to regulate the use and occupation of the rights-of-way with regard to utilities and has the power to impose a charge for use and occupation of those rights-of-way." (R1 3).

On December 12, 2000, also prior to the expiration of the franchise, Winter Park passed Ordinance 2420-01 on first reading setting forth parameters for granting any new electric franchise to build, own and operate electric distribution lines and associated facilities. (R1 134-148). This ordinance was adopted and later became effective on June 12, 2001. This ordinance also provided:

> **SECTION 17 TERMS GOVERNING "HOLD OVER" FRANCHISEES**. In the event that any Franchisee has been granted a franchise by the City prior to the date of this Ordinance (a "Pre-existing Franchise") or if an Electric Distribution Service Franchise granted under this Ordinance is terminated, revoked, or expires, then upon the termination, revocation, or expiration of said franchise, the following shall apply:
>
> > **(1) Termination of Franchise**. The City may, in its sole discretion, either terminate the franchise rights of

> Franchisee or enter into negotiations for a new franchise consistent with the requirements of this Ordinance.
>
> (2) **Interim Rights of Parties**. If the City chooses to enter into negotiations with a Franchisee under Section 17(1) above, or if a Pre-existing Franchise holder refuses to renew or extend its Pre-existing Franchise, or if the Pre-existing Franchise expires under its own terms, or if a termination event under Section 13 occurs, then Franchisee shall be considered a tenant at sufferance on the City's property, streets and rights-of-way and shall be obligated to continue to perform its obligations under the terms of the terminated Pre-existing Franchise or Electric Distributions Service Franchise (as applicable) until any such negotiations have been completed and a new Electric Distribution Service Franchise has become effective or, if applicable, arbitration proceedings have been completed and the City has exercised its option to acquire title and complete the purchase of the Electric Distribution System.

(R1 147). The FPC franchise expired at midnight on June 12, 2001, the same day that Ordinance 2420-01 took effect. FPC ceased paying franchise fees to Winter Park upon expiration of the franchise. (R1 15).

On July 3, 2001, Winter Park filed a Motion for Temporary Injunction to require FPC to Continue Paying Franchise Fees. (R1 15-19). A hearing on Winter Park's motion was held on July 9, 2001. The trial court found that Winter Park had met the standards for a temporary injunction and ordered FPC to

continue to collect and remit the franchise fees to Winter Park. (R1 101-102).

On July 31, 2001, FPC filed a Motion to Dissolve Temporary Injunction or, in the Alternative, to Require Plaintiff to Post Bond or to Require FPC Only to Collect and Not to Pay (hereinafter "FPC's Motion to Dissolve or Modify Temporary Injunction"). (R1 103-110). FPC did not allege any changes in circumstances or facts from the time the temporary injunction was granted by the trial court. (R1 103-110). Winter Park filed a Motion to Strike FPC's Motion to Dissolve or Modify Temporary Injunction since there had not been any changes in circumstances to warrant a dissolution or modification of the trial court's temporary injunction. (R1 111-114). Winter Park also argued at the hearing that FPC's motivation was solely to put economic pressure on Winter Park since the franchise fees represented approximately $1,600,000 of annual revenue to Winter Park. (R1 120-121). Moreover, since the franchise fees are paid *by the customers* as a pass through charge and are not paid out of FPC's profit or rate base, the only purpose of FPC's request to have the franchise fees put into escrow and not paid to Winter Park was to cut off revenues to Winter Park and discourage Winter Park with proceeding in its attempts to have the purchase price of the system determined through arbitration.

The trial court granted Winter Park's Motion to Strike FPC's Motion to Dissolve or Modify Temporary Injunction, denied FPC's Motion to Require a Bond, and granted FPC's Motion to have the franchise fees escrowed rather than paid to Winter Park. (R1 122-123).

Pursuant to the Court's Order Granting a Speedy Hearing on an Action for Declaratory Judgment (A1), a final hearing was held on October 9, 2001 (A2). At that hearing, FPC conceded that it was bound by the Fifth District Court of Appeal's decision in Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001) (R3 743), and an order was entered compelling the parties to arbitrate the purchase price of FPC's distribution facilities located in Winter Park. (A4 2). The trial court also considered Winter Park's additional claims for relief which had been requested in its Complaint for Declaratory Judgment, including Winter Park's request for the Court to "order FPC to comply with all provisions of the Franchise, including the payment of franchise fees, for so long as FPC continues to utilize Winter Park rights-of-way." (R1 4). The same relief was requested by Winter Park in its separately filed Motion to Release Escrow Funds. (A3 1).

At the trial on October 9, 2001, Winter Park then presented the following evidence:

1. Documentary evidence of the 1927 Winter Park ordinance which required the payment of a 2% of revenue franchise fee from FPC (R3 606); the 1947 Winter Park ordinance which required the payment of a 2-4% of revenue franchise fee from FPC (R3 607); the 1971 Winter Park ordinance which required the payment of a 6% franchise fee from FPC (R3 607); the January 9, 2001, Winter Park Ordinance which extended the 1971 franchise for an additional six months (R3 608); the 2001 Winter Park ordinance which sets the parameters for the City of Winter Park granting future electrical franchises and providing for the payment of franchise fees from holdover franchisees (R3 608); 64 franchise agreements between Florida Power and other municipalities in Florida (some with buyout provisions, some without buyout provisions), all containing a 6% franchise fee (R3 611-613); May 19, 2000, letter from Ken Cone of FPC to Winter Park, transmitting a draft franchise agreement with a 6% franchise fee and no purchase option (R3 618); and an October 13, 2000, letter and revised draft franchise agreement with a 6% franchise fee from FPC to Winter Park (R3 618-619).

2. Doug Metcalf, Winter Park City Commissioner, testified that FPC would not agree to any new franchise which contained a purchase option. (R3 624-626). He also testified that FPC stopped paying franchise fees to Winter Park and that

Winter Park continues to provide the same level of maintenance, regulation and protection of the rights-of-way even though Winter Park is not receiving any revenues from FPC for that service. (R3 627-628). Mr. Metcalf further testified that FPC continued to profit and benefit from the use of Winter Park's rights-of-way in the form of pole attachment fees and from revenues from the sale of electricity to the citizens of Winter Park. (R3 628). Finally, Mr. Metcalf testified that FPC had been paying Winter Park franchise fees for 74 years. (R3 629). Upon questioning by the Court, Mr. Metcalf testified that Winter Park received about $1.6 million dollars a year under the 1971 franchise agreement which contained a purchase option (also known as a "buyback" or "recapture" provision) and that FPC had offered $1.7 million dollars a year for a new franchise agreement without a recapture provision. (R3 634).

3. Randy Knight, Assistant City Manager of Winter Park, testified that Winter Park performs the following functions in regulating and maintaining the rights-of-way: maintains roads, paving and sidewalks; maintains drainage; maintains traffic control; patches potholes; sweeps streets; trims trees and maintains any landscaping in the right-of-way. (R3 640-641). In addition, Mr. Knight testified that the Winter Park Fire Department responds to all downed power lines, and there had

been 99 such calls in the first nine months of the calendar year. (R3 641). Mr. Knight also testified that the on-scene time for the fire department was in excess of forty minutes for each call because the fire department crew waits at the scene until FPC arrives to address the problem. (R3 642). Mr. Knight also testified that the police department has to deal with any road blockage or traffic problems caused by downed power lines. (R3 642). Mr. Knight testified Winter Park paid FPC to underground the facilities located on Pennsylvania Avenue in Winter Park because FPC had identified that area as a number one area for reliability problems. (R3 642). Mr. Knight testified that he estimated that Winter Park currently spends over $4,500,000.00 per year on maintaining the rights-of-way. (R3 643). Mr. Knight testified that FPC was not currently paying Winter Park anything for the use of Winter Park's rights-of-way, but that Winter Park continued to pay FPC for electricity used by Winter Park. (R3 644). On cross examination, Mr. Knight acknowledged that he had to estimate the total cost of maintaining and regulating the rights-of-way because Winter Park did not keep its records in such a way which would allow for a precise allocation of the costs used to maintain and regulate the rights-of-way. (R3 647-649). On cross examination, Mr. Knight testified that the value of the land occupied by FPC would exceed the 6%

franchise fee and that it was very expensive for Winter Park to have the property used by FPC off of the tax roles. (R3 651).

FPC called one witness, Robert Matthews, regional projects manager for FPC. (R3 669). Mr. Matthews testified that FPC’s poles, wires, conductors and transformers, which are used to serve residents of Winter Park, are generally located within the Winter Park road rights-of-way. (R3 671). Mr. Matthews also testified that there were a couple of hundred of miles of overhead lines in Winter Park and that the typical electrical easement was five to ten feet in width. (R3 674). Mr. Matthews testified on cross-examination that there was no engineering reason why FPC could not relocate its poles and wires onto property that it purchases from private property owners or the city. (R3 673). He also testified that FPC had not tried to purchase any easement rights from Winter Park. (R3 673). Mr. Matthews testified that FPC rented space on FPC’s poles, located within Winter Park’s rights-of-way, to cable companies and telephone companies. (R3 674-675). FPC receives about $7,000,000 per year from these rental agreements. (R3 676). Mr. Matthews testified that these payments have continued to be paid to FPC since the franchise with Winter Park expired. (R3 678). Finally, Mr. Matthews testified that FPC owns the facilities which Winter

Park paid to underground on Pennsylvania Avenue. (R3 677-678).

In its Findings Following Non-Jury Trial, the trial court found that it would be inequitable to allow FPC to reap the benefits of the expired franchise agreement by continuing to occupy Winter Park's rights-of-way while disavowing its obligation to continue to pay a franchise fee for the use of the rights-of-way. (R3 1045). The trial court analogized the expired franchise with an expired lease agreement. (R3 1045). Under Florida statutory law, as well as the common law, a tenant who continues to occupy property under an expired lease agreement must continue to pay rent in at least the same amount under the same terms as in the expired lease. (R3 1045). By analogy, the trial court found that FPC should likewise continue to meet its obligations under the expired franchise agreement while the purchase price is finally resolved and while FPC continues to use Winter Park's rights-of-way and continues to conduct its electric business. (R3 1046). In that regard, the trial court stated:

> While it reaps its benefits, FPC should meet its obligations. Until the buyback clause issue is finally resolved, FPC has the status of a holdover tenant at sufferance on City's property and is obligated to either vacate or abide by the terms of the original agreement. (R3 1045).

Upon motion filed by Winter Park, the Fifth District Court of Appeal relinquished jurisdiction to the trial court "for entry of a final order of permanent injunction." (R3 1047). Pursuant to the Fifth District Court's relinquishment of jurisdiction, a Partial Final Judgment was entered by the trial court on December 20, 2001. FPC appealed that Partial Final Judgment. The Partial Final Judgment was affirmed by the Fifth District Court of Appeal in Florida Power Corp. v. City of Winter Park, 827 So. 2d 322 (Fla. 5th DCA 2002).

STANDARD OF REVIEW

It is generally recognized in Florida case law that 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. 3d DCA 1968); Johnson v. Killian, 27 So. 2d 345, 346 (Fla. 1946). Deference is given to the decision made by the trial court since it was in the best position to evaluate the evidence presented by both parties in support for and opposition to the injunction. "As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error." Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 670 (Fla. 1993), rev'd in part on other grounds, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

A permanent mandatory injunction resting on factual matters "lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion... This is particularly true where the order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate." Operation Rescue, 626 So. 2d at 670. In reviewing a trial court's decision to grant or deny a permanent mandatory injunction, the appellate court must determine, based on the reasonableness standard, whether the trial court abused its discretion. The reasonableness standard consists of determining whether reasonable men could differ as to the propriety of the action taken by the trial court. If so, then the action is not unreasonable and there can be no finding of an abuse of discretion. See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). In Canakaris, this Court further stated, "The discretionary ruling of the trial judge should be disturbed **only** when his decision fails to satisfy this test of reasonableness." Id.(emphasis added).

In the instant case, the Partial Final Judgment granting the City's request for a permanent injunction rests on factual matters and carries a presumption of correctness. This Court should not reverse the trial court's decision unless it finds, pursuant to the reasonableness standard, that the trial court abused its discretion in granting the permanent mandatory

injunction.

SUMMARY OF ARGUMENT

This case concerns a contractual, franchise relationship between FPC and Winter Park which relationship ended in June, 2001. When FPC refused to acknowledge the termination of its contractual right to be the provider of electrical service in Winter Park through the grant of a franchise by the City, Winter Park sought equitable relief in the Circuit Court of the Ninth Judicial Circuit. The trial court, and later the Fifth District Court of Appeal, properly applied traditional contract principles to find that FPC could not continue to reap the benefits of the expired contract without living up to its own obligations under the expired contract. The trial court entered an injunction requiring FPC to continue to perform under the contract (franchise) until such time as the relationship could be effectively severed by Winter Park's exercise of its contractual right to have the purchase price of the distribution assets determined through a binding arbitration proceeding.

FPC received the right to do business and profit from operating an electric system within the City of Winter Park for 74 years. During that period of time, FPC collected franchise fees from its customers and in turn, paid the franchise fees to Winter Park, as it was required to do under the franchise agreements. During that period of time, FPC

enjoyed the franchise privilege to be the electric supplier to Winter Park and used the streets, avenues and rights-of-way of Winter Park for erecting and maintaining its poles, lines and other equipment. During that time period, FPC never objected to the franchise, the franchise fees, nor the benefits it received under the franchise agreement. When the franchise came close to its expiration date, Winter Park and FPC were not able to agree to the terms of a new franchise agreement because FPC refused to agree to a purchase option which had been consideration for the original sale by Winter Park and a part of the electric franchise for 74 years.

Prior to the expiration of the franchise, Winter Park enacted Ordinance 2420-01, which set forth Winter Park's parameters for granting any future electric franchises within Winter Park and also requiring any pre-existing franchisee who continues to occupy the rights-of-way after the expiration of a franchise to compensate Winter Park for the use of its rights-of-way. Also prior to the expiration of the franchise, Winter Park filed a declaratory judgment action to have the purchase option declared valid, to compel arbitration of the purchase price for FPC's electrical facilities and to have the court order FPC to continue to collect and pay the franchise fees so long as FPC continued to enjoy the franchise privilege of supplying electricity to Winter Park and continued to

occupy Winter Park's property.

Winter Park has, and has always had, the power to grant or refuse to grant franchises within the City limits. It also has the power to regulate the use of its rights-of-way and other municipal property and to impose conditions to the grant of these rights. Since FPC continues to use Winter Park's property to provide electricity and Winter Park continues to regulate, maintain and protect the public rights-of-way for the benefit of the utilities in the rights-of-way, the trial court correctly ordered FPC to continue to compensate Winter Park for the franchise privileges, including the use of its rights-of-way, pending the arbitration proceedings to determine the purchase price of the facilities.

As the trial court found, the franchise relationship between FPC and Winter Park has been in existence since 1927. As part of the consideration for the franchise agreement, FPC agreed to collect and pay Winter Park a franchise fee equal to 6% of its gross revenues from power distribution within the City limits. Moreover, the trial court found that:

> It is undisputed that the proposed new agreements submitted by both parties contained provisions for renewal of the long-standing 6% fee. It is also undisputed that the negotiation impasse was caused by City's insistence that the new contract contain a buyback option, even though such an option is no longer required by law, and FPC's refusal to include such a provision, which it considered unenforceable. (R3 1054).

The Fifth District Court of Appeal's decision in City of Casselberry held that the buyback provision was enforceable. See City of Casselberry, 793 So. 2d at 1180-1181. Therefore, FPC's refusal to negotiate a new franchise agreement which included the buyback provision (which FPC maintained was unenforceable), was, as a legal matter, incorrect. FPC, however, sought to take advantage of Winter Park's inability to immediately "oust" FPC from Winter Park's rights-of-way for non-payment of the franchise fees, and unjustifiably stopped collecting the franchise fees and paying such fees over to Winter Park. The trial court and the Fifth District Court of Appeal correctly distinguished Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), by pointing out that the Alachua County case involved a new "privilege fee" rather than the continuation of a 74 year old contract which had been bargained for between the parties. The trial court found that:

> [E]vidence presented to this Court shows that Winter Park's 6% franchise fee has been established by negotiation between the parties for more than seventy years, and was even proposed by both parties this year for any new agreement. Evidence also shows that the annual cost of maintaining the streets and rights-of-way typically is more than double the annual fee collected from FPC, and that City responded with police and fire services to an average of 10 downed power lines per month in the first nine months of 2001. The amount of land occupied in

> Winter Park by FPC amounts to more than two hundred acres. <u>While City was unable to provide an exact ratio of the cost of regulating and maintaining the rights-of-way to FPC's occupation and use, it did offer sufficient evidence that the 6% fee was reasonably related to such costs. It also presented strong evidence that the 6% fee is a fair 'market rate' for such use, occupation, or rental.</u> (emphasis added)(R3 1056).

In making the analogy between the expired franchise agreement and an expired lease agreement, the trial court concluded that "while the franchise fee technically is not rent, and FPC is not literally a holdover tenant, the nature of the relationship, the obligation breached and the remedy are analogous." Finally, the trial court concluded the following:

> FPC has continued to enjoy all of the benefits of the expired contract while refusing to pay any of the city fees. It provides electricity to customers and collects revenue for that service. It receives additional benefits from its use of city property by renting its utility poles to other entities such as telecommunications and cable companies. Such benefits add to the value of the property rights which City gave to FPC in exchange for the fee. (R3 1045).

FPC did not present any evidence that the 6% fee was unreasonable or was not a market rate. The testimony of its only witness, Robert Matthews, was that it would be expensive and inconvenient for FPC to acquire (either through voluntary purchases or by eminent domain) the necessary easements or agreements for the placement of its poles and wires outside

Winter Park’s rights-of-way. Moreover, Mr. Matthews admitted that he was not aware of any attempts by FPC to purchase or acquire the necessary rights from Winter Park. Rather, FPC has taken the inequitable position that it can continue to enjoy all of the franchise benefits (providing electric service and occupation of Winter Park’s property) without providing any compensation to Winter Park. Accordingly, the trial court and the Fifth District Court of Appeal were abundantly correct in requiring FPC to continue to pay the franchise fees while it continues to occupy the City’s property.

ARGUMENT

The fundamental question in this appeal is what is the appropriate remedy for a party's failure to accept the termination of a contractual right to be the electric service provider within a city? Can the party continue to enjoy all of the benefits conferred by the expired contract, while at the same time, disavowing any reciprocal obligation that it has under the expired contract? The trial court properly found that equitable principles in Florida law prevented this windfall to FPC.

In addition, FPC's failure to continue to pay the franchise fees at the expiration of the franchise was a violation of Ordinance 2420-1. This Ordinance is presumed valid. Violations of a municipal ordinance may be enjoined without any showing of irreparable harm. If a party brazenly violates a duly adopted municipal ordinance, irreparable harm is presumed. Furthermore, Winter Park demonstrated irreparable harm. Winter Park argued and the trial court accepted that it would be impossible to re-collect the franchise fees at a later time since the customers of FPC change daily.

I. UNDER HOME RULE POWER, THE CITY OF WINTER PARK HAS THE AUTHORITY TO GRANT, OR TO REFUSE TO GRANT, AUTHORITY TO A PRIVATE UTILITY SUCH AS FLORIDA POWER TO BE THE ELECTRIC SERVICE PROVIDER WITHIN THE CITY

For a period of 74 years, FPC and its predecessor have

enjoyed the “special privilege” of a franchise within Winter Park. A franchise is defined as:

> [A] right or privilege conferred by law for the provision of some public purpose or service, which cannot be exercised without the express permission of the sovereign power, such as by a legislative grant. It is a privilege conferred by the government on an individual or a corporation to do that which does not belong to the citizens of the country generally by common right. For example, a right to lay rail or pipes, or to string wires or poles along a public street, is not an ordinary use which everyone may make of the streets, but is a special privilege, or franchise, granted for the accomplishment of public objects.

36 Am. Jur. 2d Franchises From Public Entities §1 (2001). As this Court has stated:

> A franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right. All franchises belong to the government in trust for its people. Franchises do not become the absolute property of any one, but their use may be granted or permitted by proper governmental authority, subject to supervision and regulation, and upon such terms as may be lawfully imposed. They are permitted to be used for the good of the public, usually for the purpose of rendering an adequate service without unjust discrimination, and for a reasonable compensation. Franchises are not consumed in their use, and when a particular use of them by individuals or corporations ceases by non-use, forfeiture, limitation or otherwise, the further use may be granted or permitted to others. Private rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation.

Leonard v. Baylen St. Wharf Co., 52 So. 718 (Fla. 1910).

Since Winter Park has the inherent authority to grant (or refuse to grant) franchises within the city limits, the expiration of the previous franchise signals an end to FPC's right and authority to construct, operate, and maintain electric power facilities in the City. Winter Park Ordinance 991, enacted in 1971, provided FPC with the following authority for a term of thirty years:

> 1. The right, privilege and franchise to construct, operate and maintain in the said City of Winter Park, all electric power facilities required by the grantee [FPC] for the purpose of supplying electricity to grantor [Winter Park], its inhabitants and the places of business located within grantor's [Winter Park's] boundaries.
>
> 2. The right, privilege, franchise, power and authority to use the streets, avenues, alleys, easements, wharfs, bridges, public thoroughfares, public grounds and/or other public places of grantor as they now exist or may hereafter be constructed, open, laid out or extended beyond the present geographical boundary lines of grantor.

In exchange for these rights and privileges, FPC agreed to pay to Winter Park, "an amount which added to the amount of all taxes, licenses, and other impositions levied or imposed by the grantor upon the grantee's electric property, business or operations for the preceding tax year, will equal 6% of grantee's revenues from the sale of electrical energy to residential and commercial customers within the corporate limits of the grantor." In addition, Winter Park was given

the right, at and after the expiration of the franchise, to purchase the electric plant and facilities of FPC located within the corporate limits of Winter Park which were used under or in connection with this franchise or right, at a valuation to be fixed by arbitration.

Winter Park has the inherent power to require a franchise from a utility in order for that utility to operate within Winter Park. See Ellis v. Tampa Waterworks Co., 47 So. 358, 360 (Fla. 1908) (finding that the usual functions of a municipal government include granting privileges in the use of its streets for the purpose of rendering services of a public nature); Capital City Light & Fuel Co. v. City of Tallahassee, 28 So. 810, 814 (Fla. 1900) (stating the general incorporation law for cities includes a general power to provide for the lighting of the streets of the city and to regulate, and improve the streets of the city); Blair v. City of Chicago, 201 U.S. 400, 440 (1906) (finding a state granted railroad franchise was "of no practical value" until supplemented by the consent of the city to use the city's rights-of-way). According to Section 166.042(1), Fla Stat., which is known as the "Municipal Home Rule Powers Act:"

> It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the [repealed] 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.

One such power was contained in Section 167.22, Fla. Stat., which was repealed in 1973. That section conferred to municipalities the power to grant franchises to utilities and to include purchase options for the facilities by the municipalities in such franchises.

Section 337.401(2), Fla. Stat., in pertinent part states, "[n]o utility shall be installed ... unless authorized by a written permit issued by the authority." Pursuant to Section 366.11(2), Fla. Stat., Winter Park has police power over streets and rights-of-way and the statutory right to "continue to receive revenue from any public utility as is now or as may be hereafter provided in any franchise."

This Court has held that a city has the inherent power, authority, and prerogative to provide utility service to its residents and preclude competition. See Ellis, 47 So. at 360; Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968); AmeriSteel Corp. v. Clark, 691 So. 2d 473, 478 (Fla. 1997). Since a municipality has a paramount right to provide utility services to its residents, it also has the right to contract with another for the provision of that service or to grant a franchise allowing another entity to serve its residents for a limited time period. See Ellis, 47 So. at 360.

Therefore, if a city which has exercised its power to franchise the right to provide electrical service to its residents, then that same city must also have the corresponding right, upon termination or expiration of that franchise, to end the grant of authority. Although FPC readily admits that the franchise has expired, it argues that the expiration of the franchise has absolutely no impact on its right, authority, and privilege to continue to provide electrical service to the residents of Winter Park and the corresponding right to use the public rights-of-way of Winter Park to accomplish those purposes. FPC's position appears to be that, although it has "mutually agreed to franchises" with over 100 cities, that the absence of such a franchise does not destroy its right, authority, or privilege to provide electrical service to the residents of the city and to use the public rights of way. This position is contrary to the language of the franchise agreement itself which expressly acknowledges that it is the City (and not FPC) which has the ability to bestow the privilege to provide electrical service and to bestow the authority to use the public rights of way to accomplish this purpose. It is also contrary to the overwhelming number of cases where this issue has been considered. See City of Fayetteville v. Fayetteville Water, Light & Power Co., 135 F. 400, 404 (E.D.N.C. 1905) ("[T]he

city parted with its sovereignty to defendant for only a limited time, reserving the right to resume its sovereignty, and limiting the right of way given defendant in its streets, so that, upon such limitation taking effect, the defendant could no longer do business as a water company.”); City of Indianapolis v. Consumers’ Gas Trust Co., 144 F. 640, 644 (7th Cir. 1906), cert. den., Cole v. City of Indianapolis, 203 U.S. 592 (1906) (“While the incorporated gas company was the creature of the state, with its being and inherent powers derived alone from the state enactments … it is alike unquestionable that such incorporation conferred no power to exercise the purposes declared in the organization for supplying gas within the city of Indianapolis, except as expressly authorized by the municipality. The city being the source of the grant, not merely a consenter to it, the terms and duration of the grant to that end were prerogatives of the city, delegated by the state, and the gas company was powerless, equally with any individual, to exact terms or privileges.” (emphasis added))

Both FPC in its brief and Tampa Electric Company ("TECO") in its amicus brief claim that the Florida Legislature has preempted Winter Park from charging rent for usage of its rights-of-way by virtue of the adoption of a "vast statutory framework." Florida law recognizes two types of preemption:

express and implied. See Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 101 (Fla. 1st DCA 1994). An express preemption by the legislature must be specifically and directly contained in the statute. See Hillsborough County v. Fla. Rest. Ass'n, 603 So. 2d 587, 590 (Fla. 2d DCA 1992). It cannot be implied or inferred. See Id. Chapter 366, Fla. Stat. does not contain an express preemption by the legislature and in fact, contains various provisions confirming the retention of power by municipalities.

An implied preemption is found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area and where strong public policy reasons exist for finding such an area to be preempted by the Legislature. See Lowe v. Broward County, 766 So. 2d 1199, 1207 (Fla. 4th DCA 2000). "The courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers." Tallahassee Mem'l Reg'l Medical Ctr., Inc. v. Tallahassee Medical Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996). See also St. Johns County v. N.E. Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991).

Nowhere in Chapters 337, 366, 166, Fla. Stat., or anywhere else is there any express or implied preemption of any powers held by cities to provide electric service to its

residents, to grant electric franchises, and to collect franchise fees based upon rental value or the value of conducting the electric business in a city (or any other reasonable basis).

On the contrary, existing statutes, case law, and other sources indicate that such authority remains undiminished. Nowhere does Chapter 337, Fla. Stat. mention any preemption of municipal electric franchise powers. Chapter 366, Fla. Stat. has since its adoption expressly preserved municipal electric franchise powers through Section 366.11, Fla. Stat., and the right to charge franchise fees.[2]

In addition, FPC’s argument would render the expiration of the franchise agreement as a non-event because FPC could continue to enjoy all of the benefits conferred by the franchise, without any of the corresponding obligations. This would amount to a perpetual, exclusive franchise.

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[2]The 1951 version of Chapter 366 contained an express reference to preservation of Section 167.22, the purchase option statute. Although repealed and replaced by Section 166.042 in 1973, the reference to Section 167.22 in Section 366.11 was left unchanged when the so-called “Grid Bill” was adopted in 1974. <u>See</u> Section 366.11(2), Florida Statutes (1975) and Chapter 74-196, Laws of Florida (1974). The express reference to a repealed statute was not deleted until 1977 as part of a scrivener’s revision bill. <u>See</u> Chapter 77-104, Laws of Florida (1977). Presumably, if the Florida Legislature intended that these broad municipal electric franchise powers were to be preempted in 1974, some affirmative statement would have been made and reference to an already repealed statute would have been deleted.

Franchise grants are construed against the grantee and in favor of the public. See Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926, 928 (Fla. 1983); Delta & Pine Land Co. v. Peoples Gin Co., 546 F. Supp. 939, 943 (N.D. Miss. 1982), aff'd, 694 F.2d 1012 (5th Cir. 1983). Grants of franchises are in the nature of a monopoly and are strictly construed against the grantee. See Capital City Light & Fuel Co., 28 So. at 814; City of Durham v. Durham Pub. Serv. Co., 109 S.E. 40, 41 (N.C. 1921), aff'd, Durham Pub. Serv. Co. v. City of Durham, 261 U.S. 149 (1923); Mitchell v. Dakota Cent. Tel. Co., 246 U.S. 396, 412 (1918).

A franchise is not renewable unless the franchise clearly provides that it is renewable. See City of Cleveland v. Cleveland Elec. Ry. Co., 201 U.S. 529 (1906). The courts generally will not construe a franchise agreement in such a way as to render it perpetual or permanent. See Blair, 201 U.S. at 452; State v. Des Moines City Ry. Co., 140 N.W. 437, 448 (Iowa 1913). As stated in Leonard, "All franchises belong to the government in trust for its people." Leonard, 52 So. at 718. Franchises do not become the absolute property of anyone, but their use may be granted or permitted by proper governmental authority, subject to supervision and regulation,

and upon such terms as may be lawfully imposed.[3] The expiration of the franchise granted to FPC by Winter Park effectively terminated FPC's right and authority to be the electric service provider in Winter Park; to construe the franchise in any other way would amount to a perpetual monopoly of FPC's service.

II. FPC HAS NO AUTHORITY TO PROVIDE ELECTRICAL SERVICE WITHIN WINTER PARK, NOR TO USE THE PUBLIC RIGHTS OF WAY, WITHOUT A VALID FRANCHISE AGREEMENT.

FPC's statutory "duty to serve" does not abrogate the necessity for FPC to have a valid franchise with Winter Park in order to continue to provide service within Winter Park and to use the City's rights-of-way in the provision of such service. In City of Wilson v. Weber, the Supreme Court of Kansas considered the rights of a private electric utility company which had reached the expiration of its franchise with the City of Wilson. City of Wilson v. Weber, 166 P. 512 (Kan. 1917).

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[3]While FPC cites several pre-home rules cases for the notion that "electric utilities' use of public rights-of-way cannot be burdened by fees," the cases actually support the argument that private corporations cannot gain exclusive perpetual rights in rights-of-way against the public rights held in trust by cities. See Roney Inv. Co. v. City of Miami Beach, 174 So. 26 (Fla 1937); Fla. Cent. and Peninsula R.R. Co. v. Ocala St. and Suburban R.R. Co., 22 So. 692 (Fla. 1897); City of Jacksonville v. Jacksonville St. R.R. Co., 10 So. 590 (Fla. 1892).

The City of Wilson brought an action to enjoin the Wilson Electric Light Company from illegally occupying and using the streets of the city for the distribution of electric light and power. The franchise agreement between the electric company and the city had been entered into in 1901 and expired by its own terms in 1916. The utility company argued that it was providing electric service pursuant to regulation of the Public Utilities Commission of the state. The utility company contended that the creation of the Public Utility Commission and its exclusive jurisdiction implicitly superceded and repealed the authority of a city to control its public rights of way and to grant franchises to operate within the city. Indeed, the precise question on appeal was framed as, "[D]id the legislature in the enactment of the Public Utilities Act intend that the control of the cities and the granting of franchises to persons or corporations to operate within the city should be taken from the mayor and council on whom it had been expressly conferred and give it to the Public Utilities Commission?" Id. at 513. The court concluded that the Public Utilities Act dealt with rates and service and gave the Commission full power and jurisdiction respecting these matters. The court explicitly held that the Commission's power to regulate rates and service did not usurp a city's authority to require a franchise to conduct business within the city

limits and to use the public rights-of-way of the city. Therefore, once the franchise had expired, the city was within its rights to request and receive an injunction requiring the utility to remove its equipment from the streets owned by the city. See id. at 514. See also Detroit United R.R. v. City of Detroit, 229 U.S. 39, 45-46 (1913)("[W]here a street railroad is authorized to operate in the streets of a city for a definite and fixed time, and has enjoyed the full term granted, it may, upon failure to renew the grant, be required, within a reasonable time, to remove its tracks and other property from the streets.")

Similarly, other courts have held that allowing a public utility to continue to serve city residents without a valid franchise would nullify a city's inherent rights to grant (or refuse to grant) franchises and to control the city's rights-of-way. See United Tel. Co. v. City of Hill City, 899 P.2d 489, 498-500 (Kan. 1995)(discussing the balance between the statutory powers of telephone companies to lay and maintain their lines in public roads, the powers of municipalities to grant franchises, and the statutory power of the Kansas Corporation Commission to grant certificates of convenience and necessity; although telephone company had received a grant of convenience and necessity to serve city, it still needed a valid franchise from the city in order to provide

service within the city); Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200, 212 (N.C. 1989)("The power to grant or to refuse to grant a franchise is vested solely in the governing body of the city. This power is essentially legislative in nature, and its exercise is discretionary.")

Upon the expiration of a franchise of a public utility, there is no longer any contractual relationship between the city and the utility, and the right of the utility to operate under the franchise and to use the city premises and property ceases. See Ludlow v. Union Light, Heat & Power Co., 22 S.W.2d 909, 910 (Ky. Ct. App. 1929); City of Detroit v. Detroit Union Ry., 184 N.W. 516, 518-519 (Mich. 1921); Iowa Elec. Light & Power Co. v. Town of Grand Junction, 250 N.W. 136, 139-140 (Iowa 1933). On the expiration of a franchise, the right of a public utility to occupy the streets and render service terminates, and mere acquiescence on the part of the municipal officials in the continued occupation of the streets gives the public utility no additional right and does not estop the city from insisting upon its discontinuing service and the occupation of the streets. See Ohio Elec. Power Co. v. State, 167 N.E. 877, 878 (Ohio 1929); City of San Diego v. Southern Cal. Tel. Corp., 266 P.2d 14, 21 (Cal. 1954).

III. FPC MUST PAY FOR ITS USE OF THE FRANCHISE RIGHTS AND FOR ITS USE OF THE PUBLIC RIGHTS-OF-WAY AFTER EXPIRATION OF THE FRANCHISE

It is black letter law that a party to a contract who continues to enjoy the privileges conferred in the contract upon the expiration of the contract is liable to the other party for the value of the rights enjoyed under a theory of implied contract, unjust enrichment, quantum meruit, equitable estoppel or holdover tenancy.

Although Winter Park has the legal ability to refuse to grant a new franchise to FPC, as a practical matter, it has no ability to immediately exclude FPC from the rights-of-way because the public's health, safety and welfare might be jeopardized. Winter Park is in the process of exercising its right to purchase the electrical distribution assets owned by FPC within the City. The City is abiding by the contract (franchise) and having the purchase price of the distribution assets owned by FPC determined in a binding arbitration. This is the process agreed to by the parties. FPC cannot take unfair advantage of this situation because common law principles of implied contract, unjust enrichment, quantum meruit, equitable estoppel and holdover tenancy require FPC to continue to pay for that which it continues to use. A party may not continue to enjoy the benefits of a contract once the contract has been terminated or expires, without paying for those privileges. City of San Diego, 266 P.2d at 21-22

(finding that the court could not force a city to grant a franchise and that the city was entitled to a franchise fee for the time period in which telephone company used city rights-of-way without a franchise).

A. IMPLIED CONTRACT AND QUANTUM MERUIT

Quantum meruit is a common law method of recovery that means "as much as deserved." Black's Law Dictionary 1243 (6th ed. 1990). Where services are rendered or goods received outside of a written agreement, the courts may look to a prior written agreement between the parties to determine a fair price for the goods or services under an implied contract theory. For example, in Westinghouse Credit Corp. v. Grandoff Invs., Inc., 297 So. 2d 104, 106 (Fla. 2d DCA 1974), a 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 trial court determined that the extra square footage was not covered within the written lease agreement, the court found that there was an implied contract for the lessee to pay for what it used. The court looked to the written lease agreement for the other leased space and determined what the lessee had been paying on a per square foot basis. This amount was the implied contract amount for the lessee's use of the extra square footage. See id. at 106-107.

Likewise, in the present case, FPC continues to use all of the rights, privileges and authorities which were granted under the franchise agreement. The franchise agreement itself contains a negotiated consideration for FPC's use of these rights, privileges and authority. There is an implied contract between FPC and Winter Park that FPC will continue to pay for that which it is using, under the same terms and conditions of the expired contract.

B. UNJUST ENRICHMENT

The requirement that FPC continue to pay franchise fees to the city is also supported under a theory of unjust enrichment. Unjust enrichment is an equitable remedy which may be applicable where no express contract exists. See Thunderwave Inc. v. Carnival Corp., 954 F. Supp. 1562, 1565-1566 (S.D. Fla. 1997). 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 City of Las Cruces v. El Paso Elec. Co., 1997 W.L. 1089567 (D.C.N.M. 1997), the court considered claims by the City of Las Cruces for unjust enrichment. The defendant, El Paso Electric Company had franchises from the City of Las Cruces from 1911 to 1994. These 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

streets in order to provide electricity to residents of the city. The parties were not able to agree to the terms of a new franchise agreement, but the electric company continued to occupy and use the property of the city. See id. at *1-2. The court considered the three elements of an unjust enrichment claim:

1. That a benefit was conferred;
2. That there was an acceptance of the benefit; and
3. That the circumstances indicate that such a result would be harsh and inequitable. See id. at *3.

Based on facts of that case, the court found that the city had established a claim for unjust enrichment. The court found that the electric company had been unjustly enriched in the amount of 2% of its gross revenues (the same fee which was paid under the written franchise agreement which had expired). See id. at *5. This decision was affirmed on appeal in City of Las Cruces v. El Paso Elec. Co., 166 F.3d 1220 (10th Cir. 1999).

In the present case, FPC would be unjustly enriched if it were able to continue to receive all of the benefits under the expired franchise agreement without compensating the City for these benefits.

C. EQUITABLE ESTOPPEL

Under the principals of equitable estoppel, a party may not 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 R.R. Co., 737 F.2d 1520, 1522 (11th Cir. 1984); Kaneb Servs., Inc. v. Federal Savings and Loan Ins. Corp., 650 F.2d 78, 81 (5th Cir. 1981).

In the present case, FPC operated its electric distribution system within Winter Park under franchise agreements which granted FPC the rights and privileges of a franchise, as well as the use of the City's rights-of-way for a franchise fee which was calculated as a percentage of gross revenues. At no time did FPC allege that the payment of such a fee was an unconstitutional tax. Having accepted all of the benefits of the franchise relationship, and continuing to accept the benefits of the franchise even though it has expired, FPC should be equitably estopped from now asserting that the payment of franchise fees based on a percentage of gross revenues is an unconstitutional tax.

D. HOLDOVER TENANCY

In Chapter 83, Fla. Stat., the Florida Legislature adopted holdover provisions with regard to any residential or commercial lease. Thus, upon the expiration of a lease of real property, a holdover tenant becomes a "tenant at sufferance"

which is liable for the same rental payments which it previously paid under the expired or terminated lease. Even if the court finds that a condition precedent to a lease did not occur, a "tenant should not be allowed to accept the benefits of possession while avoiding all duty of payment." Fla. Atl. Marine, Inc. v. Seminole Boatyard, Inc., 630 So. 2d 219, 221 (Fla. 4th DCA 1993). The general rule in Florida is that a tenant which holds over with the consent or acquiescence of the landlord is presumed to have a 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 & Accident Ins. Co. v. United States, 357 F.2d 145, 148 (5th Cir. 1966). There is an implied obligation that both parties must abide by the terms of the original agreement. See Wingert, 123 So. 2d at 279; Rosamond v. Mann, 80 So. 2d 317, 319-320 (Fla. 1955).

In a franchise context, courts have held that a plaintiff has its choice. It may collect either the franchise fees per the agreement for the holdover period, or it may recover the profits it could have made during the holdover period, had it had possession of the property. See KFC Corp. v. Lilleoren, 821 F. Supp. 1191, 1193 (W.D. Ky. 1993); Ramada Inns, Inc. v. Gadsden Motel Co., 804 F.2d 1562, 1565-1567 (11th Cir. 1986); McDonald's Corp. v. CB Mgmt., Inc., 1998 U.S. Dist. LEXIS

12553, *2 (N.D. Ill. 1998)(Plaintiff cannot recover both, “as that would involve double-counting.”) In Charter Communications, Inc. v. Santa Cruz, the court acknowledged that the cable television operator which continued to operate after the expiration of the franchise “continued to operate as a holdover tenant.” Charter Communications, Inc. v. Santa Cruz, 133 F. Supp. 2d 1184, 1188 (N.D. Cal. 2001). A holdover tenant is liable for the reasonable rental value of the property on the same terms and conditions of the original lease. See Nelson v. Growers Ford Tractor Co., 282 So. 2d 664, 666 (Fla. 4th DCA 1973); Woodard Tire Co., Inc. v. Hartley Realty, Inc., 596 So. 2d 1114, 1116 (Fla. 3d DCA 1992).

The trial court properly found that FPC should not be permitted to discontinue the collection and payment of the franchise fees to Winter Park while FPC effectively continues to enjoy all of the benefits of a franchise. To do so would be to grant FPC a perpetual, exclusive, and free franchise at the public’s expense and without any legislative intent to create such a permanent privilege and monopoly.

IV. ORDINANCE 2420-01 REQUIRES FPC TO PAY FRANCHISE FEES UNTIL THE CITY EXERCISES ITS PURCHASE OPTION

In addition to common law and common sense which requires the continued payment of the fees, Winter Park also enacted an Ordinance which requires FPC to continue to collect and pay the franchise fees while the purchase price of the electric facilities is being arbitrated. Section 17 of this Ordinance is set forth in full in the Statement of Facts.

The Municipal Home Powers Act secures for municipalities the broad exercise of home rule power granted by the Constitution. The legislature's intent in enacting the Act was to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary 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.

Pursuant to Section 166.021(1)-(3), Fla. Stat., municipal legislative bodies have the power to enact any ordinances concerning any subject matter on which the state legislature may act, with the following exceptions:(a) annexation, merger, and exercise of extraterritorial power;(b) any subject expressly prohibited by the Constitution; (c) any subject expressly pre-empted to state or county government by the Constitution or by general law; and (d) any subject pre-empted to a county pursuant to a county charter adopted under the

Constitution. See Lake Worth Utils. Auth. v. City of Lake Worth, 468 So. 2d 215, 216-217 (Fla. 1985); Gaines v. City of Orlando, 450 So. 2d 1174, 1178 (Fla. 5th DCA 1984); City of Boca Raton v. State, 595 So. 2d 25, 28 (Fla. 1992). The common rule for legislation, including ordinances, is that it takes immediate effect upon passage. See 5 McQuillin, The Law of Municipal Corporations, §15.39 (3d ed. 1996). Therefore, an ordinance is valid and enforceable when all legal requirements for its passage have been complied with by the legislative body. See id.

Where an ordinance is passed relating to a matter that is within the legislative power of a county or municipality, the ordinance is presumed to be valid, constitutional, and reasonable. See City of Miami v. Kayfetz, 92 So. 2d 798, 801 (Fla. 1957); Thomas v. City of West Palm Beach, 299 So. 2d 11, 15 (Fla. 1974); Prior v. White, 180 So. 347, 356 (Fla. 1938); McAuley v. York, 106 So. 418, 419 (Fla. 1925); Seaboard Air Line R.R. Co. v. Hawes, 269 So. 2d 392, 396 (Fla. 4th DCA 1972).

Further, when a local ordinance appears on its face to have been regularly enacted, all presumptions will be indulged in favor of its validity. The courts will not inquire into the motives of a governing body of a municipal corporation in adopting an ordinance that is legislative in character. Nor

will they consider the policy or wisdom of the enactment. See City of Wilton Manors v. Starling, 121 So. 2d 172, 174 (Fla. 2d DCA 1960). Moreover, a court will not consider a constitutional question where the case may be decided on other grounds. See City of Miami, 92 So. 2d at 800; Union Trust Co. v. Lucas, 125 So. 2d 582 (Fla. 2d DCA 1960).

Where a county or municipal ordinance is attacked on the grounds of unreasonableness or unconstitutionality, the burden is on the person alleging its invalidity to establish that fact. In other words, if an ordinance is not inherently unreasonable, unfair, or oppressive, a person attacking it must assume the burden of affirmatively showing that as applied to him or her it is unreasonable, unfair, or oppressive. See Union Trust Co., 125 So. 2d at 587; Gates v. City of Sanford, 566 So. 2d 47, 49 (Fla. 5th DCA 1990).

It is well settled in Florida law that when a municipality seeks to enjoin a party from violating an ordinance, irreparable harm is presumed. See Rich v. Ryals, 212 So. 2d 641, 643-644 (Fla. 1968); Dade County v. O'Brien, 660 So. 2d 364, 365 (Fla. 3d DCA 1995); State v. Kaszyk, 590 So. 2d 1010, 1011 (Fla. 3d DCA 1991). In P.M. Realty & Invs., Inc. v. City of Tampa, P.M. Realty appealed the trial court's non-final order granting a Motion for Preliminary Injunction filed by the City of Tampa. P.M. Realty & Invs., Inc. v. City

of Tampa, 779 So. 2d 404, 405 (Fla. 2d DCA 2000). In upholding the preliminary injunction, the Court found that, "the trial court properly held that when one violates a city ordinance, irreparable harm is presumed." Id. at 406.

Ordinance 2420-01 requires a franchisee under an expired electric franchise to continue paying franchise fees while an arbitration proceeding to determine the purchase price of the electric distribution facilities is pending. This ordinance is a valid exercise of Winter Park's home rule powers and provides additional support for the lower court's rulings.

V. FRANCHISE FEES ARE NOT IMPERMISSIBLE TAXES

In City of Oviedo v. Alafaya Utils., Inc., the court confirmed a city's unfettered right to adopt reasonable rules and regulations pertaining to the use of its rights-of-way in accordance with Section 337.401, Fla. Stat. City of Oviedo v. Alafaya Utils., Inc., 704 So. 2d 206, 207 (Fla. 5th DCA 1998). In City of Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976), this Court rejected the Commission's arguments which analyzed the city's franchise fees as taxes and held:

> [W]e have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not 'taxes'. The cities would lack lawful authority to impose taxes of this type and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities.

See also Pac. Tel. and Tel. Co. v. City of Los Angeles, 282 P.2d 36, 43 (Cal. 1955) (stating a fee which city may exact for franchise to use streets and public property is not a tax).

In Alachua County, this Court reaffirmed its previous holdings that "cities have the power 'to impose a charge for the use and occupation of the streets by [a utility company] embraced in the power given to the city to regulate its streets.'" Alachua County, 737 So. 2d at 1067 (quoting City of Pensacola v. S. Bell Tel. Co., 37 So. 820, 824 (Fla. 1905). In Alachua County, this Court further explained:

> [M]unicipalities which have the power and are charged with the duty of regulating the use of their streets may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of their streets by telegraph and telephone companies, and may also impose a reasonable charge in the enforcement of local governmental supervision, the latter being a police regulation. (citations omitted)

Alachua County, 737 So. 2d at 1067.

Significantly, the Alachua County case involved a new "privilege fee." The undisputed facts of that case were:(a) that the privilege fee was not related to the extent of the use of the electric utilities of the county rights-of-way; (b) the privilege fee was not related to the reasonable rental value of the land occupied by electric utilities within the county rights-of-way; (c) the privilege fee was not related to

Alachua County's costs of regulating the use by electric utilities of the county rights-of-way; (d) the privilege fee was not related to the cost of maintaining the portion of county rights-of-way occupied by electric utilities; (e) the privilege fee did not represent a bargained for agreement between Alachua County and any electric utility, but was unilaterally imposed upon the electric utilities by the County; (f) electric utilities providing electric service to consumers in Alachua County could not reasonably avoid the privilege fee by removing their equipment and facilities from the county rights-of-way; and (g) the revenue derived from the imposition of the privilege fee was intended to fund general county operations and to reduce the county ad valorem tax millage rate.[4] See id. at 1066-1067.

Unlike the Alachua County case, Winter Park and FPC have established a rate which was bargained for and agreed to by the parties and which constituted a reasonable fee for the extent of use by FPC within Winter Park's rights-of-way, the reasonable rental value of the land occupied by the electric utilities within Winter Park's rights-of-way, Winter Park's cost of regulating the use by electric utilities within Winter

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[4]A careful reading of Alachua County reveals that the lower court, sitting in its capacity as a bond validation court, received a stipulation of the parties to each of these facts.

Park's rights-of-way and the cost of maintaining the portion of Winter Park's rights-of-way occupied by FPC. This right was established in the 1971 Franchise Agreement as 6% and was also established in the proposed franchise agreements exchanged between FPC and Winter Park in 2000 and 2001. FPC pays a 6% franchise fee in over 100 franchises with municipalities that it has entered into throughout the State of Florida.

It is significant that Alachua County tried to justify its "privilege fee" after the fact by arguing that it was a franchise fee. In the instant case, FPC has always paid a franchise fee to Winter Park for the use of Winter Park's rights-of-way and this fee had its genesis in the purchase and sale of the electric distribution facilities to FPC's predecessor.[5]

Also unlike the Alachua County case, FPC may avoid paying any fee to Winter Park by vacating Winter Park's rights-of-way. Since Alachua County involved a new "privilege fee" which was not merely a carryover of a prior, bargained for reasonable rental rate, it is inapplicable to the present

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[5]Clearly, the Supreme Court in Alachua based its decision in part on the later-day imposition of a fee with no factual basis or contract history where the utility had previously existed for decades. Here, however, the City and its electric system and rights-of-way predate FPC. Moreover, unlike counties, the Florida Legislature has gone to great lengths to preserve city franchise rights. See Sections 366.11(2) and 166.042, Fla. Stat.

case. Moreover, the other franchise agreements between FPC and municipalities throughout the state as well as the multitude of agreements between other utilities and municipalities establish that the market rate for the use and occupation of a municipality's rights-of-way is overwhelmingly 6% of the electric utilities' gross revenues generated within the municipality.

The distinction between a tax and a fee is that there is no requirement that taxes provide any special benefit to the property. In contrast, fees "must confer a special benefit on feepayers 'in a manner not shared by those not paying the fee.'" Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 135 (Fla. 2000)(quoting Collier County v. State, 733 So. 2d 1012, 1019 (Fla. 1999)). A special assessment must satisfy a two prong test in order to be considered a valid special assessment rather than a tax: (1) the service at issue must provide a special benefit to the assessed property; and (2) the assessment must be properly apportioned. See SMM Properties, Inc. v. City of North Lauderdale, 760 So. 2d 998, 1001 (Fla. 4th DCA 2000). The legislative determination is presumed correct and the burden is on the party contesting this special assessment to establish its invalidity.

In the present case, there is no dispute that (1) FPC has historically paid a 6% fee to Winter Park for the use of its

rights-of-way under a Franchise Agreement which included the purchase option; and (2) in the franchise negotiations between FPC and Winter Park, the 6% fee was never an issue, only the purchase option. FPC should not be able to unilaterally adopt a corporate policy which prohibits entering into Franchise Agreements with a purchase option when a franchise relationship has existed for over 70 years between the parties and then use the absence of a franchise agreement as an excuse for withholding payment for the use of Winter Park's property.

In Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc., the First DCA held that the City Port Authority's 6% gross receipts charge on off airport rental car agencies was not a tax. Jacksonville Port Auth. v. Alamo Rent-A-Car, 600 So. 2d 1159, 1165-1166 (Fla. 1st DCA 1992). The parties had stipulated that the 6% fee did not directly correlate with any cost analysis performed and that the fees Alamo paid were used to generate revenue for support of all three local airports, even though Alamo only served one of the airports. See id. at 1161. The Jacksonville Port Auth. court noted:

> We are convinced the fees need not relate only to the use of the airport roads and shuttle stops, but may apply to general airport maintenance and operational costs. They are not levied merely to cover the costs of a service *enlarged* because of the presence of Alamo. Rather, construction and maintenance of the Airport was undertaken for

> airline *passengers*, who in turn are the customers for both on- and off-site rental car companies. Alamo is but one of the businesses which flock to the area, desiring to pluck a portion of the existing commuter market arising from the Airport's already established facility. The added burden Alamo places on the Airport includes, of course, the element of increased traffic from Alamo's shuttle buses and the need for a pick/up/drop/off area. The benefit Alamo receives, however, flows from all phases of the airport operation.

Id. at 1163 (quoting Alamo Rent-A-Car, Inc. V. Bd. of Supervisors, 221 Cal. App. 3d 198, 207-208 (Cal. Ct. App. 1990)).

Likewise, it is irrelevant that Winter Park did not present evidence that the 6% fee was related to the incremental cost of maintaining or regulating the right of way caused by FPC's presence in the right of way. FPC has agreed that the 6% fee is the proper compensation to Winter Park for the use of its rights-of-way and FPC should be estopped from arguing otherwise.

CONCLUSION

The 6% franchise fee paid by FPC has historically provided funds to Winter Park to permit the use of and to regulate, maintain, and protect the public rights-of-way which Winter Park holds in trust for the public. Other utilities which occupy the rights-of-way also pay a franchise fee to Winter Park to defer the costs which Winter Park incurs to

protect such utilities (and the traveling public) within the public rights-of-way. Although Winter Park may chose to perform the same level of regulation and maintenance of the public rights-of-way, with or without FPC occupying the rights-of-way, it is only fair that FPC bear its share of the burden of these costs during the time in which it continues to use public property to generate profits for its shareholders. FPC also receives payments from other service providers who use FPC poles in Winter Park’s rights-of-way. FPC would be unjustly enriched if it were permitted to accept these payments without paying anything to Winter Park. Public policy requires FPC to continue to pay Winter Park’s franchise fees until such time as a new franchise agreement is entered into or Winter Park purchases the electrical distribution system. Any other result will be a windfall and unjust enrichment to FPC in that it would, in effect, obtain a perpetual, exclusive monopoly as the electric provider in Winter Park by the use of Winter Park’s property for which it is not paying.

During the temporary injunction hearing, the trial court had the opportunity to consider and receive competent and substantial evidence related to the standards for granting this relief. It also had ample opportunity to consider the equities and fairness of allowing FPC:

- Continued use of over 200 acres of City rights-of-way and substantial profits at no cost,
- For all practical purpose, an exclusive, perpetual franchise, and
- To receive a "free ride" while vigorously litigating to thwart the City's 74-year old contractual purchase option.

Perhaps the most remarkable position argued by FPC (and the other investor-owned utilities) in this appeal is that because it is a "public utility" (and not a private company), FPC has "untrammeled access" and can use public property for free. If FPC is correct, then presumably any state-regulated corporation could claim use of other publicly-owned lands held in public trust (i.e. sovereignty submerged lands) whenever a contract or lease with the state expired. Such a position flies in the face of logic, common sense, Florida Statutes, and over 100 years of Florida Supreme Court and Fifth DCA decisions. See State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893); Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339 (Fla. 1986); Water Control Dist. v. Davidson, 638 So. 2d 521 (Fla. 5th DCA 1994). Indeed, it is the epitome of arrogance to suggest that a for profit, private monopoly heavily regulated by federal, state and local governments would ever rise to the same level of a municipal government.

For the reasons set forth above, the City of Winter Park respectfully requests this court to affirm the Partial Final Judgment imposing a permanent injunction requiring FPC to continue paying franchise fees of 6% of gross revenues to Winter Park for so long as they continue to operate within the city.

Dated this ___ day of ______________________, 2003.

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY CERTIFY, this ____ day of ______________, 2003, that the type, size and style used throughout Respondent's Answer Brief is Courier New 12-Point Font.

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