IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,
a Florida corporation,

Petitioner,

vs.

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

Respondent.
_____/

Supreme Court Case No.: SC02-2272

DCA Case Nos.: 5D02-87; 5D01-2470

L.T. Case No.: 01-CI-01-4558-39

Initial Brief of Petitioner Florida Power Corporation

R. Alexander Glenn, Esquire Associate General Counsel Progress Energy Service Company, LLC 100 Central Avenue, Suite 1D St. Petersburg, FL 33701 Counsel for Florida Power Corporation	Sylvia H. Walbolt FBN 033604 Gary L. Sasso, FBN 622575 Joseph H. Lang, Jr., FBN 059404 Hunter W. Carroll, FBN 297630 CARLTON FIELDS, P.A. Post Office Box 2861 St. Petersburg, , FL 33731-2861 Telephone: (727) 821-7000 Facsimile: (727) 822-3768 Attorneys for Petitioner Florida Power Corporation

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PRELIMINARY STATEMENT

In this Initial Brief, references to Florida Power Corporation are designated "FPC," and references to the City of Winter Park are designated "City." References to the Florida Public Service Commission are designated "PSC."

Because the decision below was rendered in an appeal from a nonfinal order granting an injunction, the record before this Court includes a three-volume appendix filed by FPC at the Fifth District, a one-volume appendix filed by the City at the Fifth District, and several supplemental documents that were inadvertently excluded from the appendices. All cites to the record (derived from FPC's appendix at the Fifth District) will be in the form: "(R[appendix number] [page number])." All cites to FPC's appendix filed with this Court will be in the form: "(A[tab number] [page number])."

All emphasis in quoted material is supplied unless otherwise stated.

INTRODUCTION

This is a review of the Fifth District's split-panel decision in Florida Power Corporation v. City of Winter Park, 827 So. 2d 322 (Fla. 5th DCA 2002), which was certified to be in direct conflict with the Second District's unanimous decision in Florida Power Corporation v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002). This Court has jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution. The decision under review also expressly and directly conflicts with this Court's decision in Alachua County v. State, 737 So. 2d 1065 (Fla. 1999). Accordingly, this Court also has jurisdiction based on the misapplication of its precedent. See art. V, § 3(b)(3), Fla. Const.

Although not a basis for jurisdiction, the decision under review additionally conflicts with a ruling rendered by Circuit Judge Terry Lewis and affirmed unanimously by the First District in Leon County v. Talquin Electric Cooperative, Inc., 795 So. 2d 1142 (Fla. 1st DCA 2001), which decision was a per curiam affirmance opinion citing to Alachua County.

STATEMENT OF THE CASE AND FACTS

1. General Background.

This case concerns the power of a city (or a court), after the expiration of a bargained-for franchise agreement, to require an electric utility to continue to pay a six-percent "fee" on the revenues from the utility's sale of electricity to customers within the city's territorial limits. FPC asserted that such a fee without a franchise agreement is, in actuality, an unconstitutional tax, prohibited by this Court's decision in Alachua County.

The Fifth District affirmed the trial court's mandatory permanent injunction requiring FPC to continue to pay, indefinitely, the same franchise fee it had previously agreed to pay for the benefits of a long-term franchise. (R3 1050-59); see City of Winter Park, 827 So. 2d at 325. The Fifth District refused to apply Alachua County to the fee sought by the City and imposed by the trial court via injunction, concluding it was "fair and reasonable" to continue FPC's payment obligations under the expired franchise agreement to prevent FPC from "extorting" favorable terms in a new franchise agreement and to prevent the City from having to raise taxes. See id. at 325. The court likened FPC to a holdover tenant in a common landlord/tenant situation, stating that, because the City could not evict FPC from the rights-of-way FPC uses to provide electric service to its customers, FPC was a tenant at sufferance, liable for payment of the

"original rent."

Judge Sawaya dissented, recognizing that this Court observed in Alachua County that a flat percent-of-revenues fee could not be imposed for use of rights-of-way in the light of the state-wide regulatory scheme for the "location and costs of providing utilities." City of Winter Park, 827 So. 2d at 326 (Sawaya, J., dissenting). Judge Sawaya viewed the unilateral imposition of the expired franchise fee as an unconstitutional tax under Alachua County.

The Fifth District certified that its decision was in direct conflict with the Second District's decision in Florida Power Corporation v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002). On virtually identical facts, the Second District held a flat percent-of-revenues fee, in the absence of a bargained-for franchise agreement, is an illegal tax under Alachua County. The First District has similarly refused to allow such a fee, affirming per curiam, based on Alachua County, Judge Lewis's decision that such a fee is in reality an unconstitutional tax. See Talquin Electric, 795 So. 2d at 1142.

All told, seven of the nine Florida appellate judges who have reviewed the issue currently before this Court have concluded that Alachua County prohibits a percent-of-revenues "fee," because, in the absence of a franchise agreement such a fee is, in actuality, an unconstitutional tax.

2. The Expired Franchise Ordinance.

FPC supplies electrical power to electrical users within the City. (R1 3); (A5 3). On January 13, 1971, in exchange for franchise terms satisfactory to both parties -- including a guaranteed franchise within the City for thirty years -- FPC agreed to pay a six-percent-of-revenues franchise fee to the City.1 (R1 6-8); (A5 6-8). The franchise agreement expired by its terms on January 12, 2001, but the parties agreed to an extension until June 12, 2001. (R1 9-10); (A5 6-8). The franchise agreement, and FPC's obligation to pay the franchise fee pursuant to the franchise agreement, expired at that time. (R1 30).

The expired franchise contained no provision for its unilateral extension, and the parties have not been able to agree to terms for a new franchise agreement. (R1 6-8); (A5 6-8). Instead, immediately upon the expiration of the franchise agreement, the City adopted Ordinance No. 2420-01, which purports to unilaterally require FPC "to continue to perform its obligations under the terms of the terminated Pre-existing Franchise," while simultaneously declaring that FPC is only a "tenant at sufferance" on City rights-of-way. (R1

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1 This particular agreement required FPC to pay "an amount which added to the amount of all taxes, licenses, and other impositions . . . will equal 6% of [FPC's] revenues from the sale of electrical energy to residential and commercial customers within the corporate limits . . . ." (R1 131-32). For ease of reference, however, the parties have referred to this fee as a "six-percent-of-revenues fee." In accordance with the PSC's rule, the fee is passed through to the electrical customers within the City. See Fla. Admin. Code § 25-6.100(7).

147).

FPC did not bargain for and has not agreed to the terms imposed under this new Ordinance. (R1 65). Because the 1971 franchise agreement has expired, FPC advised the City that FPC would not collect the franchise fee agreed to under that expired agreement. (R3 1054). FPC also refused to collect the City's new fee imposed under Ordinance 2420-01, asserting that a unilaterally imposed fee, unrelated to the City's actual cost of regulation of FPC's use of rights-of-way, constitutes an unconstitutional tax under Alachua County.

FPC filed suit to invalidate the new fee imposed under Ordinance No. 2420-01. That suit, Florida Power Corporation v. City of Winter Park, Florida, No. 01-CI-01-4558-39 (Fla. 9th Cir. Ct.), is still pending before Circuit Judge Hauser.

3. The City's separate lawsuit.

Prior to FPC's filing suit to invalidate Ordinance No. 2420-01, the City had filed the suit giving rise to this review seeking to extend the franchise fee obligations of the expired franchise agreement. The only relief that the City sought in that suit with regard to the expired franchise agreement is alleged in subsection (e) of the prayer for relief: "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 the WINTER PARK rights-of-way." (R1 4); (A5 4).

In its complaint, the City alleged it was authorized to

regulate FPC's use of rights-of-way "and has the power to impose a charge for use and occupation of those rights-of-way." (R1 3); (A5 1-3). There was no allegation by the City, however, that six percent of FPC's revenues, whatever amount those future revenues might be, was reasonably related to the City's actual costs associated with regulating FPC's use of rights-of-way. (R1 1-5); (A5 1-5). Nor was there an allegation that six-percent-of-revenues constituted a valid regulatory, franchise, or user fee.

It is the City's suit, not FPC's suit, that is before this Court, although both involve the unilateral imposition of the same "fee" that FPC challenges as a tax not authorized by general law.

4. The Temporary Injunction.

Several weeks after the parties' franchise agreement expired, the City filed a motion in its suit against FPC for "Temporary Injunction to Require Florida Power to Continue Paying Franchise Fees." (R1 15-19). The City asked the circuit court to order FPC "to continue to collect fees from its customers and continue to pay the franchise fees to Winter Park as provided by the 1971 franchise." (R1 16). The motion did not mention a regulatory fee, rental charge, or user fee, nor did it rely on the City's new Ordinance. (R1 15-19).

At the temporary injunction hearing, the City presented no evidence that the fee it sought to impose by injunction was

related to the City's regulatory costs or to the supposed rental value of FPC's use of rights-of-way. (R1 48-99). The City simply asserted that FPC had agreed to pay this fee under the now-expired franchise agreement. (R1 48-99). The City also argued, without any support in the record, that "[t]here are 109 cities with such franchises" and "[e]very one of them pays six percent." (R1 85). Finally, the City further argued that its Ordinance requiring FPC to continue to pay the expired franchise fee had to be "presumed valid" and presumptively established "a fair rental value." (R1 90).

In turn, FPC asserted that the City had no legal right to force FPC to continue to pay the franchise fee because the franchise had expired by its express terms. (R1 48-99). Under Alachua County, the only fee the City can unilaterally impose for an electric utility's use of public rights-of-way is one based on its actual cost of regulating FPC's use of rights-of-way. Because the City did not claim or prove that a flat six-percent-of-revenues "fee" was a proper regulatory fee, FPC contended that it was an unconstitutional tax, just as in Alachua County. (R1 73-83).

The trial court granted the City's motion for a temporary mandatory injunction, ruling from the bench that "there's a clear legal right for the City of Winter Park to be compensated at some rate for the use of their right-of-way, and that rate apparently at 109 other municipalities and this very municipality up until six weeks ago was presumed to be

six percent, and I think for these purposes I should go with six percent." (R1 93). In a later ruling, however, the court acknowledged: "I'm staring at Alachua v. State of Florida which indicates that this is anything but clear, that it's very much muddy as a result of that opinion concerning these fees." (R1 119).

5. The Evidentiary Hearing.

Prior to the final evidentiary hearing, FPC deposed the City's designated representative, Assistant City Manager Randy Knight. Mr. Knight acknowledged that, for the fiscal year ending September 30, 2001, the City levied an ad valorem tax on property only at the rate of 3.172 mills, which is well below the ten mill constitutional cap. (R1 44). He further acknowledged that the City's new fee was based solely on the amount of franchise fees historically paid as part of bargained-for franchises. (R1 27, 38). The City did not know its costs of regulating and maintaining rights-of-way. (R1 33, 36, 40).

FPC deposed Mr. Knight again, a month before trial. (R3 1060-1087). He had nothing "to add or change" to his previous testimony with regard to "the City's costs of maintaining and regulating the rights-of-way. . . ." (R3 1070). The only basis for the City's new fee was that this was "market value" for franchise fees; the City had no basis for its fee "other than looking at other negotiated franchises between utilities and municipalities." (R3 1070).

At the hearing, the City conceded that its complaint asked only that the court order FPC to continue to pay the expired franchise fee. (R3 544). When it became clear that the City was nonetheless going to advance other, unpleaded theories as a basis for the fee, FPC objected. (R3 568-569). The trial court agreed:

> I cannot grant the specific relief that you're requesting in your complaint under the clear holding of Alachua. I cannot unilaterally impose a franchise fee nor permit the county to pass an ordinance that essentially constitutes a tax. All I can do is, if you do amend your pleadings, consider the reasonable value of the regulatory use, the use of, I suppose, the fair rental value of the rights-of-way.

(R3 570-571). Thereafter, however, the court allowed the City to proceed on a claim for "a regulatory fee," without any amendment to the City's complaint. (R3 580).

The City's first witness, Douglas Metcalf, was a Winter Park City Commissioner. (R3 619). He did not know the City's cost of regulating or maintaining the rights-of-way. (R3 631-632). The court questioned Mr. Metcalf on this point:

> So if there is no franchise agreement and if it's worth six percent with the franchise agreement, it's, per se, worth less than six percent without a franchise agreement. So really what is it worth to the City of Winter Park in terms of their fees to insist that no one enter into a buyout? And you say it's very important, so I'm saying if it's 800,000 dollars important, that would mean three percent would be an appropriate fee assuming that this is any way to determine the fee, and the Supreme Court tells me it's not. The Supreme Court tells me it's the actual cost.

(R3 636-637).

The City then called Mr. Knight to testify. (R3 638). He

estimated that the City's total costs associated with all rights-of-way exceeded $4.5 million. (R3 643). On cross-examination, though, Mr. Knight admitted that the City did not actually know what its current cost was to maintain public rights-of-way. (R3 648). Furthermore, eight to ten utilities occupy those rights-of-way, and the City had not determined its costs to maintain or regulate FPC's use of the public rights-of-way. (R3 649).

In its case, FPC presented evidence that it would be impossible to serve its customers within the City without crossing over rights-of-way. (R3 672-73).

At the outset of closing arguments, the court remarked:

> I particularly would like to hear how I am to divine from all of this evidence or what little evidence I have received what possible value to place on the, number one, the use of the rights-of-way, if that is in fact a consideration; number two, the cost of the City of maintaining and regulating the right-of-way for the benefit of Florida Power, so if you can tell me how to do that, I'd appreciate it. . . . I think we have to do it with only passing reference to the six percent as well. Although I've admitted that six percent evidence . . ., it's clear that's not the basis that I'm supposed to use to determine the valuation.

(R3 682). At the conclusion of the hearing, the trial court characterized the City's presentation as a "paucity of evidence concerning actual cost of regulation and maintenance of the rights–of-way." (R3 748).

6. Trial Court Rulings.

The trial court thereafter entered preliminary findings, and later entered a permanent injunction requiring FPC to

continue to pay the six-percent-of-revenues franchise fee to the City based upon those preliminary findings. (R3 1050-52). The trial court ruled that FPC was a "holdover tenant at sufferance," and that the six percent of revenues was previously "bargained for" and it was "reasonably related" to the City's cost of regulating FPC's use of the rights-of-way. (R3 1058-59).

These findings were based solely on the expired franchise agreement and Mr. Knight's estimate that the City incurs approximately 4.5 million a year in total costs associated with the rights-of-way, based on the City's projected budget for all costs associated with the rights-of-way. (R3 642-43); (R3 760-66). Mr. Knight did not allocate those costs to any of the approximate ten utilities in the rights-of-way, or to the City's own use of the rights-of-way. (R3 770-771). Nor did he attempt to allocate the costs associated with the general public's use of the rights-of-way. (R3 770). Mr. Knight admitted that most of the City's costs of regulating and maintaining rights-of-way would be incurred regardless of FPC's presence in the public rights-of-way. (R3 772-780). There is no evidence connecting the City's costs associated with the rights-of-way to the revenues derived by FPC from its sale of electricity.

7. Fifth District's Decision.

In a split decision, the Fifth District affirmed, certifying that its decision was in conflict with the Second

District's decision on this issue. See City of Winter Park, 827 So. 2d at 325. The court analogized FPC's use of the public rights-of-way to the use of a holdover tenant in a traditional landlord-tenant proceeding. See id. The Fifth District commented that it was appropriate for the trial court to have imposed the expired franchise fee on FPC in order to prevent the City from being "extorted" by FPC in further franchise agreement negotiations, and to prevent the City from having to raise taxes, cut services, or dip into its reserves. See id.

Judge Sawaya dissented, agreeing with the Second Distict that such a fee, in the absence of a franchise agreement is, in actuality, an unconstitutional tax. See id. at 326 (Sawaya, J., dissenting) (citing to Town of Belleair). He also recognized that a court cannot, by injunction, extend an expired contract (i.e., the franchise agreement). See id. at 327.

SUMMARY OF THE ARGUMENT

Since the commencement of this litigation, FPC has consistently maintained that the challenged "fee" is an unconstitutional tax, citing Alachua County v. State, 737 So. 2d 1065, 1068 (Fla. 1999). FPC acknowledges it is obligated to pay the City a reasonable regulatory fee associated with FPC's use of the rights-of-way. The City, however, has never undertaken an analysis to determine what such reasonable fee would be, and it has never submitted a bill to FPC to that effect. Instead, the City, without the benefit of a franchise agreement, sought to require FPC to pay the same flat percent-of-revenue franchise fee as FPC did under the now-expired franchise agreement. Yet, the City has not granted to FPC the rights FPC previous enjoyed under the now-expired franchise agreement.

The City sought -- and obtained -- a mandatory permanent injunction that requires FPC to continue to pay the same franchise fee to the City, even though the 1971 bargained-for franchise between FPC and the City has expired. As this Court's decision in Alachua County makes clear, however, FPC cannot be forced to pay this fee in the absence of a bargained-for franchise. The unilateral imposition of a flat percent-of-revenues charge by a municipality -- or in this case, by the trial court via mandatory permanent injunction -- constitutes an illegal tax in contravention of article VII, sections 1(a) and 9(a), Florida Constitution.

ARGUMENT

I. THE CHALLENGED FLAT percent-of-revenues fee on revenues from the sale of electricity is an illegal tax.

A. Standard of Review.

The question of whether a percent-of-revenues "fee" constitutes an unconstitutional tax under this Court's decision in Alachua County constitutes a pure question of law. The standard of review for a pure question of law is de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

B. The Florida Constitution Permits Local Governments to Impose Only Ad Valorem Taxes and Taxes Authorized by General Law.

The Florida Constitution expressly provides that:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Art. VII, § 1(a), Fla. Const. Another provision further provides:

> Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited in this constitution.

Art. VII, § 9(a), Fla. Const. Accordingly, other than certain ad valorem taxes, local governments may impose taxes only if they are authorized by general law. See Collier County v. State, 733 So. 2d 1012, 1014 (Fla. 1999).

By general law, the Legislature has authorized municipalities to levy a tax not to exceed ten percent of a utility's revenues from the sale of electricity within the

municipality's territorial limits. See § 166.231(1)(a), Fla. Stat. (2001). The City has levied this tax on FPC's revenues, at the statutory ten-percent maximum. (R3 762, 790). The monies from this tax go into the City's general revenue fund. See id.

Besides section 166.231(1)(a), there is no general law authorizing a municipality to impose a tax on a utility's revenues from the sale of electricity, whether as a tax for using rights-of-way or otherwise. If the City desires to generate additional revenues from the sale of electricity, other than through bargained-for franchise agreements, the City must request the Legislature to grant additional taxing power. In the absence of such legislation, any further tax imposed by the City on FPC's revenues violates the Florida Constitution.

All "doubts as to [the taxing] powers sought to be exercised must be resolved against the municipality and in favor of the general public." City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1, 3 (Fla. 1972). Faced with local governments seeking additional revenues, this Court has continually declared that creative "fees" designed to generate revenues in circumvention of the constitutional division of taxing authority are, in fact, unlawful taxes. See, e.g., Collier County, 733 So. 2d at 1019 (holding Interim Government Services Fee constituted unconstitutional tax); State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994) (rejecting "semantics" of ordinance and concluding that city's "transportation utility fee" was unconstitutional tax).

"A tax is a forced charge or imposition, it operates

whether we like it or not and in no sense depends on the will or contract of the one on whom it is imposed." Alachua County, 737 So. 2d at 1068 (quoting State ex rel. Gulfstream Park Racing Ass'n v. Florida State Racing Comm'n, 70 So. 2d 375, 379 (Fla. 1953)). This forced charge on FPC's revenues is not agreed to by contract, is not authorized by general law, and is not a lawful user, franchise, or regulatory fee. This six-percent-of-revenues "fee," is, in actuality, a tax, in addition to and over and above the maximum ten-percent-of-revenues tax the City has imposed pursuant to section 166.231(1)(a). (R3 762, 790).

C. Alachua County Prohibits the Unilateral Imposition of a Flat Percent-of-Revenues Fee Upon FPC's Revenues.

The fee sought by the City was admittedly imposed as a funding source to supplement the City's general revenue fund, which is available for payment of any City expense. It is not specifically segregated to defray the City's costs associated with FPC's use of the rights-of-way. It is exactly the type of tax this Court expressly prohibited in Alachua County.

In that case, this Court squarely addressed the issue of whether a county's unilaterally imposed "privilege fee" for a utility's use of public rights-of-way was an unconstitutional tax. See id. at 737 So. 2d at 1066-67. The county had imposed a fee of three percent of a utility's gross receipts from the sale of electricity within the county, with such revenues flowing into the county's general revenue fund. See id. at 1066. The fee was imposed "for the 'privilege' of using county rights-of-way to deliver electricity to consumers in Alachua County."

The fee was not bargained for by any utility. See id. at 1067. No general law existed that authorized the imposition of the County's fee. Thus, if the "fee" were a tax, it would be unconstitutional. See id.; Collier County v. State, 733 So. 2d at 1014.

This Court held the flat percent-of-revenues "fee" was a tax. See Alachua County, 737 So. 2d at 1067. The fee could not be upheld either as a lawful regulatory fee or a franchise fee. See id. at 1068. This case is controlled by Alachua County. As Judge Sawaya correctly recognized in dissent, the "imposition of the expired franchise fee by the trial court is a tax unconstitutionally imposed on Florida Power." City of Winter Park, 827 So. 2d at 326 (Sawaya, J., dissenting).

It is of no legal moment that the court mandatorily enjoined the payment of the fee challenged in this case, whereas the county imposed the fee by ordinance in Alachua County. (In fact, the City is purporting to charge a six-percent-of-revenues fee under the auspices of an ordinance hastily and unilaterally enacted as the 1971 franchise agreement expired.) Plainly, neither a trial court nor appellate court can impose such fees in the first instance, nor establish their rates, because that is a legislative function, not a judicial function. See Miami Bridge Co. v. Miami Beach Ry. Co., 12 So. 2d 438, 445-46 (Fla. 1943). Consequently, separation of powers issues are invoked by a court imposing a governmental tax or fee.2 See art. II, § 3,

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2 When FPC addressed the differences between agreed-upon fees, taxes, and regulatory fees, the trial judge responded: "Isn't there a third category and that's a judicial determination? That's not a unilaterally imposed fee. That's a determination

Fla. Const. (“No person belonging to one branch shall exercise any powers appertaining to either of the other branches . . . .”).

This case, however, should be decided on grounds other than separation of powers, because the injunction itself violated Alachua County. Certainly, the trial court is constrained by the dictates of Alachua County, just as a local government would be. See, e.g., Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980) (“A trial judge may well be free to express his personal disagreement with the decisions of higher courts in some forums, but he is not free to disregard them in the exercise of his judicial duties.”). Under Alachua County, a court cannot impose what is a revenue raising tax for a local government, simply because it believes that is the fair and equitable thing to do in light of the City’s assertion that it needs this revenue stream. The majority decision of the Fifth District did precisely that in this case, which is a misapplication of Alachua County.

1. This “fee” cannot be justified as a franchise fee.

Just as in Alachua County, the “fee” sought by the City and imposed by the court is not a valid franchise fee, “because the utilities did not bargain for imposition of the Fee.” Id. at 1068. As this Court explained in that case, the county’s ordinance “conferred nothing to the utilities” and “will give nothing in exchange for imposition of a fee. . . .”

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by the Court.” (R3 603). But the trial court does not have the power to impose a tax for a utility’s use of rights-of-way. See art. III, § 1, Fla. Const. (“The legislative power of the state shall be vested in a legislature of the State of Florida[.]”).

Id. So too here, FPC has been granted no vested rights whatsoever by the City. Yet, the City nonetheless unilaterally imposed the exact same fee that FPC had agreed to pay in exchange for long-term franchise rights.

The whole reason for a franchise agreement is that it conveys legally protected rights to the franchisee. See Alachua County, 737 So. 2d at 1068 (holding a franchise is "a special privilege conferred by the government on individuals or corporations that does not belong to the citizens of a country generally by common right . . . ."). When granted, a franchise becomes a legally protected property right. See id.; see also 12 McQuillin, The Law of Municipal Corporations, § 34.03 (3d Rev. Ed.) ("When granted, a franchise becomes property in the legal sense of the word, by virtue of contractual right[.]"). The franchise fee is paid for those important, contractual rights.

Under the 1971 franchise agreement, FPC agreed to pay a six-percent franchise fee in consideration for the franchise rights granted to it by the City, including a guaranteed term of thirty years. (R1 0131). With that franchise, FPC obtained the certainty and continuity of a long-term contractual specification of its rights within the City, free from the City's interference. That eliminates exactly the type of litigation that FPC is being subjected to without a franchise, and protects against elected officials asserting different positions at different times with respect to FPC's service rights.

Since the expiration of its franchise, FPC no longer enjoys the contractual benefits, including long-term quiet enjoyment, for which it agreed to pay a six-percent franchise fee. Nonetheless, the Fifth District held that the expired franchise fee could still be imposed on FPC because, in its view, "[w]hen the franchise agreement expired by its terms, Florida Power elected to remain in possession and to exercise all of the rights previously conferred by the expired franchise agreement." Id. at 323 n.1. This is simply not the case.

As Judge Sawaya cogently explained in dissent:

> In [Town of Belleair], the court held that a franchise fee does not necessarily bear a relationship to the actual cost of regulation and maintenance of the rights-of-way. This is so because when an ordinance is enacted that establishes a franchise fee that has been bargained for by the government and the electric utility, the utility receives rights in exchange for payment of the fee other than the mere use of the government's rights-of-way. For example, the utility receives a long term contract with no guaranteed burdens, additional fees, or challenges to its rights, such as condemning the utility's facilities or taking other actions which would be inconsistent with the utility providing services to the government.

City of Winter Park, 827 So. 2d at 326 n.1 (Sawaya, J., dissenting). Continuing, he explained that:

> Unilateral imposition of the six percent fee on Florida Power after the franchise agreement has expired results in mandatory payment of the fee and deprivation of all of the other bargained-for benefits Florida Power is supposed to receive in exchange for it. On the other hand, the City continues to enjoy all of the benefits of the expired agreement. How can this be fair?

Id. The Second District made the point succinctly in Town of

Belleair, declaring that "[t]he trial court was without authority to order FPC to continue paying the franchise fee after the franchise agreement expired . . . ." 830 So. 2d at 854.

The Second District and Judge Sawaya are absolutely right: FPC does not now enjoy "all" of the same valuable legal rights it held under the 1971 franchise agreement, as the Fifth District erroneously stated. To the contrary, the City and the court have explicitly deemed FPC to be nothing more than a tenant at sufferance. See Ordinance 2420-01, § 17(2) (R1 147); (R3 1051). A tenant at sufferance has no property rights and is instead "a wrongdoer . . . ." Brady v. Scott, 175 So. 724, 724-25 (Fla. 1937).

Absent the long-term franchise rights it contractually enjoyed before, FPC cannot be required to pay the same franchise fee. Upon the expiration of that franchise agreement, the obligations of both parties -- not just one of them -- expired, no matter how much the City wants to continue receiving those franchise fee revenues.

The 1971 franchise agreement contained a specified term of years, at which time it expired by its explicit terms. "Courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties . . . ." Home Development Co. of St. Petersburg v. Bursani, 178 So. 2d 113 (Fla. 1965). Thus, courts cannot extend FPC's payment obligations under a contract that had expired by its express terms. See Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057, 1059 (Fla. 3d DCA 1995) (reversing injunction requiring compliance with expired contract). The

Second District correctly recognized this principle in Town of Belleair, holding that a "court cannot, by injunction, extend the terms of a contract after its expiration." 830 So. 2d at 854. Judge Sawaya similarly recognized this point, quoting from Town of Belleair. See City of Winter Park, 827 So. 2d at 327 (Sawaya, J., dissenting).

In short, given the expiration of the franchise agreement by its own terms, the City's new fee is not a bargained-for fee in consideration of long-term contractual benefits. Hence, it cannot be upheld as a valid franchise fee. As this Court held in Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976), true franchise fees are not taxes precisely because they "are bargained for in exchange for specific property rights relinquished by the City."

The trial court found that, since FPC had previously paid a six-percent fee to the City, that was a bargained-for amount. (R3 1058). But FPC's payments for an agreed-to franchise granting FPC valuable property rights do not alter the legal analysis dictated by Alachua County, which looks to the power of local governments to impose such a fee unilaterally, given the limits of the Florida Constitution. To hold otherwise is to say that, once FPC entered that franchise agreement, it must forever pay this exact same fee, even after the agreed-to franchise expires and it no longer enjoys "specific property rights relinquished by [the City.]" Alachua County, 737 So. 2d at 1068; Plant City, 337 So. 2d at 973. That renders meaningless the "bargained-for" requirement for a franchise set out in Alachua County and Plant City.

FPC's refusal to pay the fee demanded by the City, without the concomitant rights conferred by a long-term franchise agreement, is completely consistent with the holding in Alachua County that local government cannot unilaterally impose a franchise fee in the absence of a bargained-for franchise. See also City of Oviedo v. Alafaya Utilities, Inc., 704 So. 2d 206 (Fla. 5th DCA 1998) (statutory authority of local government to regulate rights-of-way did not authorize its compelling a utility to enter a franchise agreement). This fee cannot be upheld as a valid franchise fee.

2. This "fee" cannot be justified as rent.

The City claimed below that FPC paid a six-percent franchise fee to obtain the legal right to occupy rights-of-way and hence should continue to pay that same fee as "rent" since it continues to occupy the rights-of-way. In exactly the same way, Alachua County had sought to justify its fee as "rent," but to no avail.

Alachua County's Initial Brief to this Court, which is contained in the record in this case, asserted the following point on appeal: "Counties Possess The Home Rule Authority to Impose A Rental Charge For the Privileged Use of Public property." (R1 196). Addressing the same authorities that the City relied upon below in this case, this Court rejected Alachua County's argument that its fee could be imposed as "rent" for use of rights-of-way. See Alachua County, 737 So. 2d at 1068 & n.1 ("Alachua County's argument that the Fee is

rent is unconvincing."). In this Court's words, imposition of "rent" would be inconsistent with the "development of modern infrastructures" and the "vast statutes and regulatory schemes currently in place that affect both the location and cost of providing utilities." 737 So. 2d at 1068 n.1.

The pervasiveness of the modern regulatory scheme was carefully detailed in the utilities' briefs in Alachua County.3 As shown there, the Legislature has affirmatively conferred upon local governments only the authority to impose "reasonable regulations" regarding electric utilities' access to public rights-of-ways and to charge "permit" fees in connection therewith. § 337.401(1)-(2), (3)(a)3, Fla. Stat. (2002). Nowever, however, has the Legislature authorized local governments to charge "rent" for public utilities' use of rights-of-way. See, e.g., §§ 166.201, 166.221, 166.231 (authorizing municipalities to charge certain taxes, including the ten percent tax on electric utility revenues, and user fees, without any mention of charging public utilities "rent").

This Court further recognized in Alachua County that the Legislature's regulatory scheme also encompasses the cost to the residents of Florida for electric service. Ch. 366, Fla. Stat. That regulatory scheme requires FPC to provide electric

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3 Those briefs, which are also in the record, described the statewide legislative scheme applicable to electric utilities, citing, inter alia, sections 125.01(1)(m), 125.42(1), 166.231, 361.01, 366.03, 337.401, 425.04. See, e.g., Answer Brief of Florida Power & Light Co. (R2 350-53, 356); Answer Brief of Florida Power Corporation (R2 299, 310-15); Answer Brief of Florida Electric Cooperatives Association, Inc. (R2 400) ; see generally Ch. 366 ("Public Utilities"); Ch. 425 ("Rural Electric Cooperatives").

service at a reasonable cost to its customers. See § 366.03, Fla. Stat. In order to carry out that statutory mandate and provide efficient, reliable electrical service to the public, FPC has the incontestable right to use public rights-of-way. See § 337.401(1)-(2), Fla. Stat. (2002) (authorizing municipal regulation of utilities' use of rights-of-way).

Indeed, the City acknowledges that it cannot require FPC to remove its facilities from public rights-of-way, because FPC could not then provide electric service to its customers, as it is required to do under section 366.03. (R1 54; R3 590). If local governments could evict electric utilities from public rights-of-ways, as an ordinary "landlord" would have the right to do as an adjunct of ownership of private property, that would impermissibly interfere with the vast regulatory scheme established by the Legislature to ensure the reliable and cost-effective provision of electrical service. See Alachua County, 737 So. 2d at 1068 n.1.; Florida Power Corporation v. Seminole County, 579 So. 2d 105, 106-107 (Fla. 1991) (holding PSC's exclusive jurisdiction preempts a local government's ability to require electric utility to place its power lines underground).

In this regard, it must be emphasized that, unlike commercial landlords, local governments hold public rights-of-way in trust for the benefit of, and use by, the public. See Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1954); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 3d DCA 1968). Electric utilities provide a necessary service to the residents of this state, and electric utilities use the public rights-of-way for the public's benefit to deliver that essential service.

Requiring public utilities like FPC to pay each municipality "rent" for that use would be incompatible with the character and purpose of those public rights-of-way and would unjustifiably exacerbate the cost of electric service. Cf. Seminole County, 579 So. 2d at 108-9 (a local government's attempt to require "undergrounding" of electric facilities would impermissibly affect FPC's regulated rates leading to an increase of rates charged to all electrical customers).

It also would fly in the face of the fact that the Legislature has always maintained full authority over public streets and rights-of-way to protect the paramount public interest in untrammeled access to these public corridors. E.g., Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29 (Fla. 1937) (Legislature has plenary control over all streets and highways); Florida Cent. & P.R. Co. v. Ocala St. & S.R. Co., 22 So. 692, 696 (Fla. 1897) ("the powers of a municipal corporation 'in respect to the control of its streets are held in trust for the public benefit'" and subordinate to state legislation); State ex rel. City of Jacksonville, 10 So. 590, 592 (Fla. 1892) (Legislature has "dominant control" of highways and local streets). As a result, electric utilities' use of public rights-of-way cannot be burdened by fees and taxes that are not authorized by the Legislature.

Other than a bargained-for franchise fee, the only fee that municipalities may permissibly impose on electric utilities for their use of public rights-of-way is "a reasonable fee to cover the cost of regulation." Alachua County, 737 So. 2d at 1068. As shown below, the City's flat six-percent-of-revenues fee does not satisfy that test.

3. This "fee" cannot be justified as a regulatory fee.

In Alachua County, this Court recognized that the county's three-percent-of-revenues fee could not be upheld as a valid regulatory fee. See id. at 1068. There is no nexus between a flat percent-of-revenues fee -- since those revenues vary based on customers' use of electricity -- and the actual cost to the local government of a utility's use of public rights-of-way. 737 So. 2d at 1067-68. While utilities may be required to pay a reasonable regulatory fee, the fee cannot exceed the actual cost of regulation. See id.

FPC has always agreed to pay a fee based on the City's additional reasonable costs of regulating FPC's use of rights-of-way in providing electric service to its customers in the City. As noted by the Second District in Town of Belleair, "FPC has conceded that it is obligated to pay such fee and stands ready to do so." 830 So. 2d at 854.

However, the City's fee here does not simply offset the "cost of necessary inspection" or "expenses . . . . imposed upon the public in consequence of the business licensed." See Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170, 172 (Fla. 1960). Nor is this flat percent-of-revenues fee correlated to those costs. A six-percent-of-revenues fee -- twice the amount imposed in Alachua County but imposed for the same revenue-raising purpose -- plainly is not based on the City's costs associated with regulating FPC's use of public rights-of-way. See Bozeman v. City of Brooksville, 82 So. 2d 729, 730 (Fla. 1955) (license fee based in part on percentage of gross sales was "obviously a revenue measure, pure and

simple," rather than a regulatory fee).

By definition, a percent-of-revenues charge by the City is directly tied to how much electricity FPC's customers consume in any given month. By definition, the City's costs associated with regulating FPC's use of rights-of-way are not tied to how much electricity is used –- they are instead tied to how much the City spends to regulate FPC's use of those rights-of-way. The City's actual costs associated with FPC's static use of public rights-of-way do not vary like a utility customer's monthly electrical bill does. As in Alachua County, the imposition of a flat percent-of-revenues fee has no "nexus" to the true costs of the City's regulation of FPC's use of rights-of-way. 737 So. 2d at 1067-68.

Judge Terry Lewis made this point well in ruling that an identical flat percent-of-revenues fee imposed on the sale of electricity constituted an illegal tax. See Leon County v. Talquin Electric Cooperative, Inc., Case No. 99-5149, order at 4 (Fla. 2d Cir. Ct. order filed Apr. 28, 2000); (R2 530); (A4 530). There, Judge Lewis acknowledged the county's appraiser's opinion that the percent-of-revenue fee was reasonably related to the utility's actual use of the rights-of-way. (R2 529-30); (A4 529-30). However, as Judge Lewis explained:

> Whether the fee is an illegal tax is a question which must be determined from the face of the Ordinance itself, not whether at some point in time the fee authorized might coincidentally be equal to the value of property occupied by a utility company. In Alachua County, the County made legislative findings that the fee imposed was reasonable compensation for the use of the rights-of-way, was related to the fair rental value of such use, as

> well as the cost of regulating the rights-of-way. But the method by which the fee was calculated – 3% of gross revenues – bore no relationship to the actual use of the right-of-way.

Id. at 4; (R2 530); (A4 530).

For the same reason, the trial court's findings in this case cannot validate this fee: by definition, a flat percent-of-revenues charge is not tied to the City's actual cost of regulating FPC's use of public rights-of-way. It is tied solely to FPC's revenues, which are in turn tied solely on the amount of electricity FPC's customers use in any particular month. The amount of this fee is not related to FPC's extent of use of the public rights-of-way. Indeed, whether FPC has one pole or two thousand poles in the public rights-of-way, the fee imposed by the City each month is exactly the same. Hence, this fee does not satisfy the test set out in Alachua County for a valid regulatory fee.

Certainly, Mr. Knight's estimate that the City's cost of maintaining all its rights-of-way exceeded $4.5 million dollars does not provide the requisite nexus. (R3 642-43). Mr. Knight based his estimate on the City's projected budget for all costs associated with streets and rights-of-way. (R3 760-66). He conceded that the City had no actual records allocating its costs among the multiple entities that occupy the rights-of-way, and it had no plans to make such allocation. (R3 649). As such, his "estimate" of the City's total costs vastly over-stated any costs associated with FPC's use of those rights-of way.

Furthermore, regulatory fees must be spent only to cover costs of regulation, not to raise general revenue. See

Tamiami Trail Tours, 120 So. 2d at 172-73 (freight zone permits could not be validated as regulatory fee simply because some revenues would be allocated to the tax collector and police to offset their regulatory costs); Broward County v. Janis Dev. Corp., 311 So. 2d 371, 375 (Fla. 4th DCA 1975) (regulatory fees must be spent only to cover costs of regulation, not to raise general revenue). In this case, the fee is deposited straight into the City's general revenue account available for general appropriation. As this Court admonished over 110 years ago:

> Parties conducting the business in question away from the public market, and thereby rendering additional police expense indispensable to the preservation of the public health, may be required to bear the reasonable additional expense they occasion. The city cannot make gain under an illegal exercise of the police power; and, if it shall at any time appear or be shown that she is doing so, the regulation by which it is effected will be held void. This should be kept in careful view at all times by the authorities; for, though the courts will not be astute to avoid the regulation by making nice calculations, they should promptly arrest any clear abuse of the power.

Atkins v. Philips, 8 So. 429, 432 (Fla. 1890).

The "fee" in the case for review is not separately segregated to defray the City's cost of regulating FPC's use of rights-of-way; rather, it is a purely revenue-raising fee. It is not a valid regulatory fee, and the City should not be allowed to impose a revenue-raising fee under the guise of saying it is a regulatory fee.

4. This "fee" cannot be justified as a user fee.

Under Alachua County and City of Port Orange, a valid user fee is a fee paid by the user, completely by choice, for using the service. Here, FPC must use public rights-of-way to provide efficient service to its customers, as it is required by law to do. See ch. 366, Fla. Stat.; § 337.401, Fla. Stat.; Storey v. Mayo, 217 So. 2d 304, 307-8 (Fla. 1968) (discussing the public interest is served by electric utilities providing efficient and effective service). Indeed, FPC is statutorily required to utilize the most efficient means of providing electric services to its customers that it can. See § 366.03, Fla. Stat. FPC cannot choose to scuttle its existing system and build another on private rights-of-way. (R3 672-73).

Further, under City of Daytona Beach Shores v. State, 483 So. 2d 405, 407 (Fla. 1985), a user fee must be used solely for the "maintenance, operation and improvement" of the property for which access is charged. The City's fee is not used solely for maintaining rights-of-way, but rather is used to provide general revenues for all City operations. (R3 789-90). Hence, it is not a valid user fee.

In sum, because the percent-of-revenue fee is not a valid bargained-for franchise fee or a valid user or regulatory fee, the City has no authority to impose it upon FPC. Just as in Alachua County, this fee must be seen for what it is: a tax that is neither authorized by the Florida Constitution nor the Florida Legislature.

D. The Weight of the Decisions Have Applied Alachua County and Held That a Flat Percent-of-Revenues Fee on Electric Utilities' Revenues is an Unconstitutional Tax.

In the conflict case, the Second District correctly

applied Alachua County, recognizing that an across-the-board tax on a utility's revenues is not reasonably calculated to recover the local government's costs associated with regulating a utility's use of the rights-of-way. See Town of Belleair, 830 So. 2d at 854. There, identical to the case under review, the 1971 franchise agreement between FPC and Belleair expired without a new agreement in place. See id. at 853. Despite the absence of any bargained-for franchise, Belleair obtained a mandatory injunction requiring FPC to pay a six-percent-of-revenues fee. See id.

Relying on Alachua County, the Second District reversed, holding that the flat percent-of-revenues fee could not be justified as a regulatory fee because it bore "no relationship" to Belleair's actual costs of regulating the utility's use of the public rights-of-way. Id. at 854. The Second District concluded that "without the franchise agreement to support the negotiated franchise fee, a 6% flat fee constitutes an illegal tax pursuant to [Alachua County.]" Id.

In a brief per curiam affirmance citing to Alachua County, the First District has held consistently with the Second District. See Leon County v. Talquin Electric Cooperative, Inc., 795 So. 2d 1142 (Fla. 1st DCA 2001). Under appeal was Judge Lewis's decision that the county's three-percent-of-revenue "fee" was, in the absence of a franchise agreement, an unconstitutional tax. See Talquin Electric, Case No. 99-5149, order at 5-6; (R2 531-531A); (A4 531-531A).

Citing Alachua County and section 337.401, Judge Lewis declared that "[t]he law contemplates that bona fide utilities

should be able to use the rights-of-way of counties, subject to their reasonable rules and regulations concerning placement and maintenance." (R2 531); (A4 531). Accordingly:

> [I]f any fee is to be charged by the County, it should be based on what is reasonably necessary in order to properly monitor and enforce compliance with its rules and regulations concerning placement and maintenance of utility facilities in its rights-of-way, not what a buyer might be willing to pay based upon supply and demand in the market place.

(R2 530-31); (A4 530-31). As discussed above, Judge Lewis ruled that, in the absence of a franchise fee agreement, a percent-of-revenues charge on the sale of electricity within unincorporated Leon County was not, as a matter of law, reasonably related to the county's costs associated with the utility's actual use of the rights-of-way. (R2 530); (A4 530).

As correctly recognized by the First and Second Districts and by Judge Sawaya in dissent in this case, the import of Alachua County is that a flat percent-of-revenues fee, which is based entirely on the amount of revenues the utility collects, not on the local government's actual cost of regulating the utility's use of the rights-of-way, is an unconstitutional tax. Indeed, the City admits that the revenues generated from this fee go to increase general revenues; they go into the City's general fund, just like ad valorem taxes. (R1 35).

While the facts from the First and Second District cases were virtually identical to the facts here, the Fifth District mistakenly refused to apply Alachua County. Instead, it upheld this fee on subjective grounds of "fairness," precisely

because the fee adds revenues to the City's general fund. See City of Winter Park, 827 So. 2d at 325. The Fifth District reasoned that "[t]he city must either give in to the demands of Florida Power, impose higher taxes on its citizens, or dip into its reserves to meet costs which should be paid by the users of electricity."4 But the same can be said for any revenue-raising fee a local government seeks to impose in lieu of an authorized tax. Under Alachua County and other decisions of this Court, the desire for additional general revenues is not a proper basis for imposition of a tax under the guise of fee.

E. This Court Should Resolve the Conflict Created by the Fifth District's Decision and Re-affirm that Alachua County Precludes a Fee Such as this.

The Fifth District's decision has significant consequences for utilities serving the public in Florida. The City is now receiving exactly the same percent-of-revenues percentage as it did under the expired franchise agreement, without granting any of the rights afforded FPC under that agreement. Thus, local governments will have no reason to enter into a franchise agreement. Why would they, if they can impose the same franchise fee by simply budgeting a large amount for supposed regulation of rights-of-way?

This case, at its core, is about generating general

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4 According to the City's Assistant City Manager, the City levied 3.172 mills of ad valorem tax for fiscal year ending September 30, 2001. (R1 44). Article VII, section 9(b), Florida Constitution, caps the millage rate at ten mills for all municipal purposes. The City simply wishes to use the revenue stream from FPC's sale of electricity to allow the City to avoid raising ad valorem taxes through its authorized taxing authority.

revenues for the City. Pursuant to historic franchise agreements, local governments have used franchise fee revenues for general governmental purposes, which meant ad valorem taxes could be less. As a bargained-for franchise fee, local governments are entitled to do this. But what the City is now seeking to do through this mandatory injunction (and in Ordinance No. 2420-01) is to continue receipt of those revenues by requiring FPC to continue its obligations under the expired franchise agreement, without granting FPC the same bargained-for rights and benefits.

The Fifth District's basis to affirm the levy of the City's fee, however -- that FPC retains all its previous rights under the expired franchise agreement -- was wrong as a matter of settled Florida law. The Fifth District has improperly sanctioned the collection by the City of a franchise fee, without conferring any franchise rights to FPC.

This Court should retain jurisdiction in the case for review and resolve the conflict between the Second and Fifth Districts and the misapplication of Alachua County by the Fifth District by holding, consistent with Alachua County, that a percent-of-revenues fee, in the absence of a franchise agreement, is an unconstitutional tax because such a fee is not reasonably related to the City's true cost of regulating FPC's use of public rights-of-way. FPC is a party in both the instant case and in the related Town of Belleair case. Currently, FPC must operate under two different and contrary

court rulings, depending upon the geographic location of the state where it is operating. This is precisely the type of case this Court is empowered to decide under its constitutional grant of authority. See art. V, § 3(b), Fla. Const.

There are important policy reasons why this Court should resolve this conflict in this decision and confirm that Alachua County precludes a tax such as the City seeks to impose. The trial court sought to distinguish Alachua County by the fact it was imposing the fee by injunction, whereas in Alachua County the county imposed the fee by ordinance. Obviously, as noted above, this violates the separation of powers provision. Yet, if this Court were to decide the case on separation of powers grounds without addressing the conflict, FPC would still have to incur the additional expense of challenging in other proceedings the City's ordinance, which purports to impose a fee equivalent to the previously agreed-to franchise fee. During that period of time -- like now -- FPC would have to continue to operate under directly conflicting district court pronouncements.

In light of the express conflict in the district courts, and the fact that FPC as a single entity is now subject to conflicting decisions in different areas of Florida, this Court should decide the conflict issue. This case is fully developed, and the issue is properly before the Court. Judicial efficiency suggests that this Court resolve the issue

in this case.

CONCLUSION

This Court recently reminded that "[t]he Constitution is the charter of our liberties." Cook v. City of Jacksonville, 823 So. 2d 86, 94 (Fla. 2002). The Florida Constitution expressly provides that local governments may not tax without legislative authorization. No such authorization exists here. FPC should not be made to pay an unconstitutional tax to fund the City's general government services.

The conflict existing between the Second and Fifth District should be resolved in accord with this Court's decision in Alachua County. This Court should conclude that compelling FPC to pay a six-percent-of-revenues fee to the City, in the absence of any bargained-for franchise, constitutes an unconstitutional tax under article VII, sections 1(a) and 9(a), Florida Constitution. The trial court's injunction is inconsistent with Florida law. More, the City has attempted to effectuate this unconstitutional "fee" through its Ordinance 2420-01. Thus, without regard to the separation of powers issue, this Court should make clear that this percent-of-revenues "fee" cannot be imposed in any manner -- whether by court order or Ordinance.

Accordingly, this Court should approve the Second District's decision in Town of Belleair on this issue, quash the Fifth District's decision under review, and remand with directions to dissolve the injunction and to conduct further proceedings not inconsistent with its decision.

Respectfully submitted,

R. Alexander Glenn, Esquire Associate General Counsel Progress Energy Service Company, LLC 100 Central Avenue, Suite 1D St. Petersburg, FL 33701 Counsel for Florida Power Corporation	_____ Sylvia H. Walbolt FBN 033604 Gary L. Sasso, FBN 622575 Joseph H. Lang, Jr., FBN 059404 Hunter W. Carroll, FBN 297630 CARLTON FIELDS, P.A. Post Office Box 2861 St. Petersburg, , FL 33731-2861 Telephone: (727) 821-7000 Facsimile: (727) 822-3768 Attorneys for Petitioner Florida Power Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner Florida Power Corporation and the Appendix To Initial Brief of Petitioner Florida Power Corporation, have been furnished by Federal Express, to

Gordon H. Harris, Esquire Thomas A. Cloud, Esquire Tracy A. Marshall, Esquire Gray, Harris & Robinson, P.A. 301 East Pine St., Ste. 1400 Orlando, FL 32801 Counsel for Respondent City of Winter Park, Florida	

this ____ day of January, 2003.

by: _____

_____

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

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

by: _____

_____

Attorney for Petitioner