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

Reply Brief of Petitioner Florida Power Corporation

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REPLY BRIEF ARGUMENT

I. Alachua County Establishes That the City's Fee is an Unconstitutional Tax.

In our Initial Brief, we explained that this Court, in Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), held that a municipality does not have "home rule power" to exact a unilateral percentage-of-revenues charge on an electric utility for use of public rights-of-ways under the guise of a "franchise fee," "user fee," or "rental charge." Although this Court recognized that a municipality may charge a public utility the reasonable cost of regulating the utility's use of public rights-of-ways, by definition a percentage-of-revenues charge is not tied to the cost of regulating the utility's use of the rights-of-way; it is tied, rather, to fuel costs, electric rates, summer temperatures, and other factors extraneous to the City's cost of regulating the utility's use of the rights-of-way. Therefore, as this Court held, such a charge may not be defended as a permissible regulatory charge. Instead, it is a constitutionally prohibited "tax."

As we further discussed, the Second District's unanimous decision in Florida Power Corporation v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002), faithfully followed this Court's teachings in Alachua County and prohibited the Town of Belleair from collecting from FPC a six percent-of-revenues charge

identical to the charge in this case. The First District likewise followed Alachua County in its per curiam affirmance of Judge Terry Lewis' ruling that a percent-of-revenues fee is an unconstitutional tax. See Leon County v. Talquin Electric Cooperative, Inc., 795 So. 2d 1142 (Fla. 1st DCA 2001).

The City writes its brief here as if Alachua County were never decided and does not mention either Belleair or Talquin. Relying heavily on cases from the turn of the Twentieth Century, the City reasserts the same positions considered and rejected in Alachua County. Fundamentally, the City's argument rests on the repudiated premise that the City has "home rule power" to confer upon FPC the right to serve customers within municipal limits, and the concomitant power to take that right away.

The City proceeds from this premise to argue that it therefore must have the lesser right to charge a public utility a fee for the privilege of using rights-of-way that the City can withhold at will, in the absence of a binding agreement. Now that the parties' 1971 franchise agreement has expired, the City contends that FPC is a "holdover" tenant, continues to serve customers in the City at the sufferance of the City, must be deemed to have an "implied" contract with the City to pay for its use of the rights-of-way, and is being unjustly enriched.

The fundamental problem with the City's argument is that this Court already rejected it in Alachua County. The appellant

in that case, Alachua County, was a charter county with the same constitutional and statutory powers that the City has in this case.[1] 737 So. 2d at 1067. Like the City here, Alachua County explicitly argued that "The County's constitutional and statutory home rule authority include the power to impose the electric utility privilege fee" at issue. (R1 194).

FPC was one of the utilities involved in the Alachua County case, just as it is here. (R2 288-89). As in this case, FPC had no franchise agreement in place with the County when the County chose to impose the fee. See Alachua County, 737 So. 2d at 1068. So the County argued there, like the City argues here, that FPC occupied the County's rights-of-way as a matter of governmental grace, i.e., as a matter of "privilege," which the County could grant or take away. (E.g., Rl 185, 191). As the City contends in this case, the County argued that it had the home rule power to levy a charge upon FPC for its continuing, "privileged" use of the rights-of-way. (R1 194). This Court rejected the County's argument, holding that, in the absence of a bargained-for exchange of property rights (i.e., a franchise agreement) the County had no power to impose a fee upon FPC for the supposed

[1] The League of Cities argues that counties and municipalities have different powers. This argument is incorrect because a chartered county possesses all the powers of a municipality. See, e.g., State ex rel. Volusia County v. Dickinson, 269 So. 2d 9, 10-11 (Fla. 1972).

"privilege" of using public rights-of-ways. In fact, the fee was a constitutionally prohibited "tax."

As this Court recognized in Alachua County, the whole idea that cities own public rights-of-way as municipal fiefdoms that they may "rent" or otherwise exploit has been overtaken by "the vast statutes and regulatory schemes currently in place [in Florida] that affect both the location and cost of providing utilities." 737 So. 2d at 1068 n.1; see Florida Power Corporation v. Seminole County, 579 So. 2d 105, 108 (Fla. 1991) (invalidating city ordinance and charter county ordinance requiring utility to "underground" its overhead systems); City of Oviedo v. Alafaya Utilities, Inc., 704 So. 2d 206, 207-08 (Fla. 5th DCA 1998) (municipality may not require a utility to enter into a franchise in order to operate).

In fact, the Legislature has expressly delineated the scope of municipal control over public rights-of-way. In section 337.401(1), Florida Statutes (2002), the Legislature acted to limit municipal authority over public rights-of-way to the imposition of "reasonable rules or regulations with reference to the placing and maintaining" of "poles . . . or other structures." In view of this express legislative directive, municipalities do not possess sovereign or proprietary power to grant or deny public utilities access to public rights-of-way as they see fit, as the City contends. This express legislative

restriction conclusively refutes the City's claim that the City holds lordship over all public rights-of-way in Winter Park. Instead, under the express terms of this statute, the City is limited to regulating a utility's use of rights-of-ways and, concomitantly, charging the reasonable cost of that regulation.

The City's reliance on section 337.401(2) is mistaken. As the City recognizes, this statute provides that "[n]o utility shall be installed . . . unless authorized by a written permit issued by the [relevant] authority." This provision represents yet another manifestation that the Legislature has assigned to municipalities a regulatory role over public rights-of-way. Beyond that, this provision is irrelevant because FPC received regulatory approval to "install" its system decades ago.

As we demonstrated in our Initial Brief, and as the City does not dispute, municipalities do not hold public rights-of-way in their proprietary capacity; they do so in their governmental capacity for the benefit of the public. In. Br. at 28-29 (citing Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1954); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 3d DCA 1968)). This is the law in Florida and around the nation.[2] See 4A Nichols on Eminent

[2] See, e.g., City and County of Denver v. Qwest Corp., 18 P.3d 748, 761 (Col. 2001) ("municipalities hold public rights-of-way in a governmental capacity"); American Telephone and Telegraph, Co. v. Village of Arlington Heights, 620 N.E.2d 1040, 1044 (Ill. 1993) (cities "do not possess proprietary powers over the public streets" but only "regulatory powers"); City of New York v. Bee Line, Inc., 284 N.Y.S. 452, 456 (N.Y. App. Div. 1935) (city does not have proprietary interest in streets); City of Des Moines v.

Domain § 15.02[2] (3d ed. 1994) ("it is well settled that streets and highways owned by cities and towns are held in their governmental capacity in trust for the public"). It follows that, while the City may regulate FPC's use of public rights-of-way, and charge back to FPC the cost of such regulation, the City is not FPC's landlord and may not seek to profit from rights-of-way held in public trust.

Further, contrary to what the City contends, the City is neither the source of FPC's "duty to serve" customers in Winter Park, nor the entity that can lawfully terminate that duty. Again, the City confuses its prerogatives with those of the Legislature. Section 366.03, Florida Statutes (2002), imposes a statutory duty upon FPC to provide electric service to "each person applying therefor." As long as citizens in Winter Park turn on their light switches, FPC is required by statute to meet their needs for electricity.

Thus, the City could not be more wrong as a matter of Florida law in asserting that "[t]he 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

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Iowa Telephone Co., 162 N.W. 323, 327 (Iowa 1917) (city holds streets in trust for the public and "is not entitled to compensation for the use of its streets"); City of Zanesville v. Zanesville Telephone and Telegraph Co., 59 N.E. 781, 784 (Ohio 1901) (city may be compensated only to restore street to condition before utility constructed facility).

Park." An. Br. at 27. The City has no power to terminate FPC's statutory duty to serve.[3]

The City makes much of the fact that the City ran its own electric system at the beginning of the last century and "sold the system to FPC's predecessor," An. Br. at 1, putting FPC in business in Winter Park. That may be true, but the City already received consideration for what it sold to FPC's predecessor, and it has no right to attempt to charge FPC again for that transaction through the vehicle of an unconstitutional tax.

Undaunted, the City contends that, as a municipality, it has "the power to enact any ordinances concerning any subject matter on which the state legislature may act, with the following exceptions: . . . (b) any subject expressly prohibited by the Constitution." An. Br. at 37. The City relies on this "power" in arguing that the fee in dispute is further supported by the ordinance it enacted, levying the fee on "holdover" utilities. What the City overlooks is that this Court in Alachua County held

[3] The City asserts that it has "the inherent power to require a franchise from a utility in order for that utility to operate within Winter Park." An. Br. at 20-21. In support, however, the City relies at pp. 19-21 in its brief upon cases that confirm that a city's prerogatives in this area are subject to the superior power of the Legislature. See State ex rel. Ellis v. Tampa Waterworks Co., 47 So. 358, 360 (Fla. 1908). Indeed, this Court in Capital City Light & Fuel Co. v. City of Tallahassee, 28 So. 810, 813 (Fla. 1900), held that the city of Tallahassee was without power to grant to a utility exclusive use of rights-of-way because that power had not been given to it by the Legislature.

that an express exception to a local government's home rule power – namely, the constitutional prohibition against unauthorized taxes – does prohibit cities and counties from imposing this kind of fee.

II. No "Equitable" Grounds Support Imposition of this Fee.

The City insists, nonetheless, that it is inequitable for Florida Power to "holdover" on the City's rights-of-way without compensating the City for the value supposedly received. In this connection, the City invokes a number of "equitable" doctrines to seek payment from FPC for its use of the City's rights-of-way. These arguments are devoid of merit for several reasons.

First, as we have shown, the public rights-of-way at issue are not the City's rights-of-way in the sense the City contends. They are held in public trust, and the City simply has limited, delegated authority to regulate those rights-of-way in a reasonable manner and to charge for the cost of that regulation. See § 337.401, Fla. Stat.

Second, the Legislature has provided a means for the City to receive compensation for FPC's operation of its system in Winter Park: Municipalities may levy a tax not to exceed ten percent of a utility's revenues from the sale of electricity within municipal limits. See § 166.231(1)(a), Fla. Stat. (2002). The City has levied this tax on FPC's revenues at the maximum ten-percent level, and it could not enjoy that income but for FPC's

sale of electricity within City limits. (R3 762, 790). The City is now attempting improperly to exact an additional six percent-of-revenues tax from FPC.

Third, as the City emphasizes, under PSC regulations the six percent fee it seeks to impose must be "passed through" to the customers in Winter Park. See Fla. Admin. Code § 25-6.100(7). Thus, the City argues that "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." An. Br. at 5 (emphasis in original). This completely undermines the City's argument that it is seeking compensation from FPC to prevent "unjust enrichment" on the part of FPC or to achieve other "equitable" ends. The fact is, the City is seeking to use its unilateral fee as an indirect means to raise additional general revenues from its own citizens, but in a manner that ensures that the additional charge will show up on FPC's electric bill rather than the City's tax bill.

Fourth, in arguing that a six percent fee is a fair estimation of the value currently being enjoyed by FPC as a "holdover" tenant as evidenced by historical franchise payments, the City misses the fact that FPC previously consented to pay a six percent franchise fee in exchange for long-term contract rights that FPC no longer enjoys. In fact, the City now threatens to initiate a territorial dispute that may have to be resolved by the PSC, at continuing expense and disruption to FPC.

Under its prior agreement, FPC had a stable relationship with the City that avoided such disputes and thus benefitted both the utility and its customers.[4]

The City points out that FPC generates $7 million in annual revenues from leasing its poles to cable companies and telephone companies. This is a red herring. As the City must acknowledge (An. Br. at 9), FPC obtains these revenues from leasing access to its own personal property (its poles). Further, the City fails to disclose that the $7 million figure represents payments that FPC receives throughout the state. (R 678). Finally, the City fails to disclose that this function, too, is legislatively regulated. Federal law requires FPC to provide these companies with access to its poles and establishes formulas for charging for that use. See 47 U.S.C. § 224(f)(1); 47 C.F.R. § 1.1409.

III. There is No Evidence That the Fee Represents The Reasonable Cost of Regulating FPC's Use of Public Rights-of-way.

The City further contends that its six percent charge is a "reasonable" approximation of the City's cost of regulating FPC's use of public rights-of-way, and that the decision below is thus

[4] The City relies upon a single Florida case to argue that the Court should "imply" a contractual relationship between FPC and the City. Westinghouse Credit Corp. v. Grandoff Invs., Inc., 297 So. 2d 104 (Fla. 2d DCA 1974). That case discusses an implied contract between two private entities, not a municipality and public utility with an expired franchise. In all events, as the Second District held in Belleair, FPC does not have the contractual rights it once held under the franchise agreement. 830 So. 2d at 854. FPC should not be forced to pay the City as if the agreement were still in force.

supported by record evidence. This argument suffers from at least three fatal flaws.

First, the City's unilateral charge is calculated at six percent-of-revenues collected in Winter Park. As we have discussed, a percent-of-revenues charge by definition bears no logical relationship to the City's cost of regulating FPC's use of public rights-of-way. Rather, it is tied to FPC's base rates, fuel costs, pass-through costs of purchased power, weather patterns, conservation efforts, the efficiency of homes and businesses, and other matters that drive FPC's costs and its customers' demand. At any given time, if six percent-of-revenues should bear any relationship to the City's cost of regulation whatsoever, that would be sheer coincidence.

Second, although the City discusses record evidence of the City's $4.5 million overall costs of regulating or maintaining all public rights-of-ways – including streets, sidewalks, curbs, parks, bike trails, rail corridors, sewage drains, landscape areas, and the like, to meet the needs of all users of those rights-of-ways, including all pedestrians, automobile drivers, the City's own employees (e.g., bus drivers, police, and firefighters), all utilities, and all private businesses – the the City dispositively concedes, "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." An. Br. at 45 (emphasis in original). The City tacitly acknowledges that it was not entitled under Alachua County to charge this full cost to FPC alone, but it necessarily admits that it made no showing of what FPC's fair share of these costs might be. The evidence is undisputed that the City performed no study and has no records that would enable it to do so. (R3 770).

Third, the undisputed evidence shows that the City established its six percent fee, in the first instance, based solely on the fact that FPC had agreed to pay that fee in its prior franchise agreement with the City and in franchise agreements with other municipalities. (R 611, 618). But the fact that FPC has agreed to pay such a fee in exchange for long-term contractual rights and benefits lends no support to the City's claim that the same fee is a reasonable approximation of the City's cost of regulating FPC's use of the rights-of-way.

IV. This Court Has Not Approved Such Fees in the Past.

Finally, the City's reliance on prior decisions of this Court and certain district courts of appeals is misplaced. For example, the City posits that this Court suggested in City of Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976), that franchise fees are not taxes. In Plant City, however, this Court approved a franchise fee that was "bargained for in exchange for specific property rights[.]" See id. (quoted with approval in

Alachua County). Here, the City has imposed a pseudo "franchise" charge unilaterally upon FPC, without entering into a bilateral agreement providing the long-term rights and benefits of a true franchise arrangement.

The City contends that the Fifth District's decision in City of Oviedo authorizes a city to adopt reasonable rules and regulations pertaining to the use of public rights-of-way. FPC does not dispute this. But the court there held that a city could not require a utility to enter into a franchise agreement as a condition of providing utility service. See id. at 207-08.

The City relies on Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA 1992) to argue that the City did not have to demonstrate any nexus between its fee and how much the City spends to regulate FPC's use of public rights-of-way. That decision, however, predates Alachua County. In fact, Alachua County relied upon the Jacksonville Port Authority decision in its briefing to no avail. (E.g., R1 0180, 0191, 0196, 0197, 0200, 0203, 0204, 0206, 0208, 0210, 0211).

In any event, that case involved a user fee imposed by the Authority in its proprietary capacity upon rental car agencies that ran shuttles to the airport. The resulting revenues "were used only for the airport system." 600 So. 2d at 1164. The car rental company could have avoided the user fee by obtaining

customers elsewhere, id. at 1163, and the fee was based on cost-benefit studies, id. at 1161.

Here, by contrast, the City must act in its governmental capacity. Further, FPC cannot avoid using the public rights-of-way and thus cannot avoid the fee. The City undertook no analysis to determine its cost of regulating FPC's use of the rights-of-way. And the revenues are unrestricted general revenues. (R1 35). Thus, Alachua County – not Jacksonville Port Authority – governs the outcome of this case.

The City contends that Alachua County is distinguishable because, in that case, the utilities could not remove their facilities from the rights-of-way to avoid paying the fee. Here, the City asserts that "FPC may avoid paying any fee to Winter Park by vacating Winter Park's rights-of-way." An. Br. at 43. This ignores uncontradicted evidence that FPC continues to shoulder a statutory duty to serve the people and businesses of Winter Park and must cross the City's rights-of-way in order to do so. (R3 672). It is undisputed that FPC cannot vacate all rights-of-way and still provide service within the City. (R3 672). Moreover, FPC would be subject to the full fee under both the injunction and the City's recently enacted ordinance no matter how little of the rights-of-way it actually crosses.

The City further contends that Alachua County is distinguishable because that case involved a new privilege fee,

"not merely a carryover of a prior, bargained for reasonable rental rate." An. Br. at 43. The City's franchise agreement with FPC has expired, however, in accordance with its express terms; the agreement has not carried over. The parties here thus stand in the same relation as the County and FPC in Alachua County; FPC had no contractual rights, benefits, or protection in either case.

To elaborate, FPC occupied public rights-of-way in Alachua County, just as it does in Winter Park. (R2 0297). The County argued unsuccessfully there, as the City argues here, that FPC's use of such rights-of-way, in the absence of an agreement, was a matter of governmental grace or "privilege," which could be withdrawn or assessed. Under the County's and the City's shared view of home rule power, the parties stood in the same position in both cases – landlord and tenant at sufferance. The Court rejected that view in Alachua County and should reject it again here. The City's fee is an unlawful tax.

CONCLUSION

For these reasons and those in our Initial Brief, the Court should follow Alachua County, approve the Second District's decision in Belleair on this issue, quash the decision under review, and remand with directions to dissolve the injunction.

Respectfully submitted,

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this 1st day of April, 2003.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner Florida Power Corporation has been furnished by Federal Express, to

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 1st day of April, 2003, that the type size and style used throughout Petitioner's Initial Brief is Courier New 12-Point Font.

by: _____
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