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Florida Power Corp. v. City of Winter Park

CHIEF JUSTICE: GOOD MORNING AGAIN. FLORIDA POWER CORPORATION VERSUS CITY OF WINTER PARK. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS GARY SASSO, AND I REPRESENT FLORIDA POWER CORPORATION AND WOULD LIKE TO RESERVE FIVE MINUTES OF MY TIME FOR REBUTTAL.

OKAY.

THIS IS IN REGARD TO THE CITY OF WINTER PARK AND A CONSTITUTIONAL IMPOSITION OF IMPOSING TAXES WITHOUT THE FLORIDA LEGISLATURE.

IF IT WASN'T FOR THE STATEMENTS IN ALACHUA, DO YOU HAVE ANY OTHER CASE LAW SUPPORT FOR THAT PROPOSITION, OR ARE YOU RELYING PRIMARILY ON THAT POSITION?

NO, YOUR HONOR. THERE ARE OTHER CASES IN THE SAME VEIN OF AUTHORITY. FOR EXAMPLE PLANT CITY VERSUS MAYO, BOAZMAN VERSUS CITY OF BROOKSVILLE. THERE ARE A NUMBER OF AUTHORITIES OF THAT NATURE. THE CITY HAS IMPOSED A 6 PERCENT OF REVENUES CHARGE ON FLORIDA POWER CORPORATION, FOR PROVIDING ELECTRIC SERVICE IN WINTER PARK.

JUSTICE LEWIS, ALSO.

LET'S PLACE THIS REALLY IN THE CONTEXT, THE CITY REALLY HASN'T IMPOSED ANYTHING. THERE IS A FRANCHISE AGREEMENT THAT EXPIRED, AND THERE IS NEGOTIATIONS ONGOING OR ARBITRATION OR SOMETHING, TO ESTABLISH A PURCHASE, SO THIS BLANKET ASSERTION AS TO SOMETHING BEING IMPOSED IS A LITTLE MISLEADING OF WHAT WE ARE TALKING ABOUT, AND WE ARE REALLY TALKING ABOUT WHETHER, UNDER SUCH {SERCK} CIRCUMSTANCES -- UNDER SUCH CIRCUMSTANCES, CANNOT CONTINUE ON YOU MEAN THIS DISPUTE IS RESOLVED. IS THAT WHAT WE ARE TALKING ABOUT?

THAT IS THE WAY THE FIFTH DISTRICT COURT OF APPEALS CHARACTERIZED IT, YOUR HONOR, BUT THE CITY HAS ATTEMPTED TO COLLECT THE FEE AND HAS ASKED THE COURT TO IMPOSE AN INJUNCTION TO REQUIRE THE PAYMENT OF THE FEE.

THIS ISN'T SOMETHING THAT HAS COME OUT OF THE BLUE, SUCH AS ALACHUA ADDING A 3 PERCENT TAX OR 3 PERCENT FEE, IF YOU WILL, ON TOP OF EVERYTHING ELSE. I MEAN, THIS REALLY HAS A VERY DEFINITE FACT PATTERN THAT WE ARE DEALING WITH.

YOUR HONOR, WE WOULD SUBMIT THAT THIS CASE IS EXACTLY LIKE ALACHUA COUNTY. THE REASON WHY FRANCHISE FEES ARE NOT CONSTITUTIONALLY IMPERMISSIBLE, IS BECAUSE THEY ARE PAID BY CONSENT. BY CONSENT OF THE CONTRACTING PARTY.

IN ALACHUA, WAS THERE A FRANCHISE AGREEMENT THAT HAD EXPIRED, SUCH AS WE HAVE HERE?

NO, THERE WASN'T, YOUR HONOR.

WAS IT NOT A 3 PERCENT FEE THAT IS ATTEMPTED TO BE IMPOSED, NOTWITHSTANDING THE

EXISTENCE OR NONEXISTENCE OF A FRANCHISE FEE.

THAT'S CORRECT, YOUR HONOR, AND WE WOULD SUBMIT THAT IS EXACTLY THE POSTURE OF THIS CASE.

WOULD THAT MEAN, ARE YOU, ALSO ARE YOU SAYING THAT IT WAS IMPROPER TAX AT THE TIME THAT THE FRANCHISE AGREEMENT WAS IN PLACE?

NO, YOUR HONOR. IT WAS A CONTRACT. IT WAS A CONTRACT ENTERED INTO BETWEEN FLORIDA POWER CORPORATION AND THE CITY OF WINTER PARK, FOR GOOD AND SUFFICIENT CONSIDERATION.

SO DOESN'T THAT GET YOU BACK TO JUSTICE LEWIS'S QUESTION THAT, ISN'T THIS REALLY A CONTINUATION OF THAT CONTRACT, UNDER QUANTUM MERIT OR WHATEVER, BECAUSE YOUR CLIENT IS STILL GETTING THE BENEFITS OF THAT PART OF THE BARGAIN AND, AND NOW THE STATE IS ASKING FOR OR THE CITY IS ASKING FOR THE BENEFITS THAT IT HAD UNDER THE BARGAIN.

WE AGREE, YOUR HONOR, THAT IT IS THE GET BOTH THE CITY HAS POSED AND HAS BEEN PUT INTO ISSUE, BUT WE INSIST IN THIS CASE IN THE POSTURE THAT ALACHUA COUNTY IS IN, IN THE SENSE THAT THERE IS NO CURRENT AGREEMENT IN PLACE BETWEEN THE PARTIES. THE REASON FRANCHISE FEES ARE CONSTITUTIONALLY PERMISSIBLE, IS BECAUSE THEY ARE BARGAINED FOR AGREEMENTS. THEY ARE CONSENTUALLY PAID, AND THEREFORE THE CITY NEEDS NO COERCIVE POWER TO EXACT A PAYMENT FROM THE PAY OR.

-- FROM THE PAYOR.

AREN'T YOU STILL RECEIVING A BENEFIT THOUGH?

YOUR HONOR, THE FIFTH DISTRICT COURT OF APPEALS ARGUED AND THE CITY HAS ARGUED, THAT THE COMPANY IS RECEIVING ALL OF THE EXISTING BENEFITS THAT IT HAS UNDER THE FRANCHISE AGREEMENT, AND SO THEREFORE IT IS ONLY APPROPRIATE THAT THE COMPANY HAVE TO PAY AN ATTENDANT FEE, BUT WE WOULD CONTEND, YOUR HONOR, THAT THAT IS NOT THE CASE THAT, IT IGNORES THE ESSENCE OF THE FRANCHISE AGREEMENT. BOTH THE CITY AND THE LEAGUE OF CITIES IN THEIR AMICUS BRIEF CONCEDE THAT THE ESSENCE OF THE FRANCHISE AGREEMENT IS THE AGREEMENT OF THE CITY TO REFRAIN FROM ATTEMPTING TO PROVIDE ELECTRIC SERVICES WITHIN THE CITY. THAT IS WHAT THE FRANCHISE IS. THE CITY HAS GIVEN UP ITS PREROGATIVE TO PROVIDE SERVICES IN THE CITY AND HAS CEDED THAT TO THE {NAMPBLING} ICEESE. -- TO THE FRANCHISEE. THE CITY GIVES FLORIDA POWER CORPORATION THE OPTION TO PROVIDE TO THE CITY OF WINTER PARK AND AGREED IN THE FRANCHISE, THE CITY CAN ATTEMPT TO TAKE BACK THE SYSTEM, BUT ONLY AT OR AFTER THE EXPIRATION OF THE AGREEMENT, SO WHAT THAT MEANS IS FOR A PERIOD OF 30 YEARS, THE COMPANY HAS THE ASSURANCE THAT IT CAN INVEST IN THE SYSTEM AND OPERATE THE SYSTEM, WITHOUT ANY EFFORT BY THE CITY TO SUPPLANT OR USURP THE COMPANY'S RIGHT TO OPERATE IN THE CITY.

IS THAT WHY WE ARE HERE, BECAUSE THE AGREEMENT HAS EX-{SNIRD}.

THE AGREEMENT HAS EXPIRED, YOUR HONOR.

YOU HAVE NO LONGER ANY RIGHT, YOU HAVE NO FRANCHISE ANY LONGER, TO OPERATE ELECTRIC FAST ITS IN THE CITY.

WE WOULD DISAGREE WITH THAT, YOUR HONOR. IN FACT, UNDER THE FLORIDA STATUTES, THE COMPANY HAS A DUTY TO SERVE, TO CONTINUE TO OPERATE IN THE CITY, AND WINTER PARK HAS CONCEDED THAT. IN FACT, THE FLORIDA TRIAL COURT --

YOU CAN ROUTELIZE THE RIGHTS OF WAY AND THE ENTIRE -- TO UTILIZE THE RIGHTS OF WAY AND THE ENTIRE AGREEMENT AND ALL OF THE UTILITY COMPANIES CAN WALK AWAY, AT THE END OF THE AGREEMENT, AND SAY WE ARE NOT GOING TO WORK WITH YOU NOW. WHY WOULD THAT NOT BE THE CASE?

NO. IT IS CRITICAL WHAT THE COMPANY PROVIDES IN A FRANCHISE AGREEMENT. IN THIS CASE A FRANCHISE AGREEMENT TO THE COMPANY FOR ITS CUSTOMERS. DURING THE DECADES-LONG AGREEMENT, THE COMPANY WAS ENTITLED TO THE PEACEFUL USE OF THIS FRANCHISE IN THE CITY AND ONCE THAT EXPIRED, ALL BETS WERE OFF, AND EVEN IN ANTICIPATION OF THE EXPIRATION AND CERTAINLY SINCE THAT EXPIRATION DATE, THE COMPANY HAS BEEN INVOLVED IN ARBITRATION, NEGOTIATION, AND THREATS BY THE CITY TO TAKE BACK THE SYSTEM. IT HAS NOT ENJOYED THE PEACEABLE EN{JOI.} THE FRANCHISE THAT IT WAS ENTITLED TO RECEIVE DURING THE PERIOD OF THE FRANCHISE AGREEMENT.

OTHER THAN THE CONCERN THAT THE CITY MAY, AT SOME FUTURE DATE, TAKE BACK OVER, PROVIDE SERVICES BY SOME OTHER MEANS, OTHER THAN THAT, FUTURE PROTECTION, WHAT PRESENT BENEFIT, UNDER THE FRANCHISE AGREEMENT THAT PREVIOUSLY EXISTED, FLORIDA POWER NOT RECEIVE SOMETHING.

WELL, THAT IS THE ESSENCE OF THE FRANCHISE AGREEMENT, AND ALL PARTIES CONCEDE THAT THAT IS THE ESSENCE OF THE FRANCHISE AGREEMENT, IS THAT THE CITY RE{FRANS} FROM ATTEMPTING TO PROVIDE SERVICE, ITSELF, WESTBOUND -- RE{FRANS} -- REFRAINS FROM PROVIDING SERVICE, ITSELF, WITHIN THE CITY. SINCE THE FRANCHISE AGREEMENT EXPIRED, THE CITY AND FLORIDA POWER HAVE BEEN EMBATTLED WITH REGARD TO THE CITIZENS OF WINTER PARK.

THE WAY I HEAR JUSTICE LEWIS'S QUESTION, IS THAT WHAT IS THE, WHAT DOES FLORIDA POWER SUGGESTION IS AN APPROPRIATE METHOD OF GOING FORWARD, IF, DURING THE FRANCHISE PERIOD, THERE IS A, NOT AN AGREEMENT TO EXTEND THE FRANCHISE. THE CITY, AS HAS HAPPENED HERE, AND THE POWER COMPANY DON'T WORK OUT THEIR PROBLEMS, THEN WHAT DOES FLORIDA POWER SAY IS THE APPROPRIATE METHOD BY WHICH THEY ARE TO GO FORWARD, UNTIL THERE IS A FURTHER AGREEMENT?

WELL HAD, THERE ARE FEW RESPONSES TO THAT, YOUR HONOR. FIRST, BETWEEN THE PARTIES, THEY ARE AT LIBERTY THEMSELVES, TO ATTEMPT TO NEGOTIATE A NEW AGREEMENT, WHICH THEY HAVE ATTEMPTED TO DO. SECOND, THE ONE CHARGE THAT THE CITY HAS, THE COERCIVE ABILITY TO IMPOSE, IS A REGULATORY CHARGE NOT TO EXCEED THE COST OF REGULATION. THAT HAS BEEN ESTABLISHED BY ALACHUA COUNTY AND ALSO ESTABLISHED BY BOAZMAN VERSUS CITY OF BROOKSVILLE.

MAYBE ALACHUA IS NOT WELL-REASONED AND WELL THOUGHT OUT. MAYBE JUSTICE OVERTON'S FEARS ARE COMING TO FROM YOUICS, THAT EVERY TIME -- TO FRUITION, IT THAT NOW EVERY TIME ONE OF THESE DRINK THINGS EX-PAIR, POWER COMPANY, UTILITY COMPANIES ARE GOING TO SAY WE ARE ENTITLED TO OPERATE THESE FREE, WITHOUT THE IMPOSITION OF ANY CHARGES.

THAT IS NOT THE REALITY, YOUR HONOR. THE AMICUS BRIEFS IN A NUMBER OF CASES, SHOW THAT THERE A NUMBER OF FRANCHISE AGREEMENTS NOT ENTERED INTO, AND THE SETTLEMENT STILL EXISTS ON THE PART OF -- AND THE ABILITY STILL EXISTS ON THE PART OF THE CITY AND THE POWER COMPANY, AND THE WHOLE OF THE RECORD SHOWS THAT THE CITY HAS WE REFUSED TO ENTER INTO A FRANCHISE AGREEMENT WITHOUT A BUY BACK AGREEMENT, AND THE COMPANY WAS NOT GOING TO GIVE ONE. THAT IS THE IMPACT OF THESE NEGOTIATIONS, AND THERE IS NO AUTHORITY FOR THE COURT TO IMPOSE THE DECISION IN THE NEGOTIATIONS, FOR ONE AND NOT THE OTHER.

THE PRIVILEGE FEE, AS IT WAS CALLED, WAS NOT RELATED TO THE RENTAL OF THE LAND OCCUPIED BY THE ELECTRIC UTILITIES. IN THIS CASE, THE TRIAL COURT MADE FINDINGS, AFTER ARGUMENT AND EVIDENCE, AND I KNOW YOU ARE FAMILIAR WITH THE FINDINGS THAT IS IN THERE, THAT SAYS THAT THE LONG STANDING FEE OF 6 PERCENT WAS BARGAINED FOR AND DOES BEAR A REASONABLE RELATIONSHIP TO THE COST OF MAINTAINING AND REGULATING THE OCCUPATION OF CITY LAND, AS WELL AS THE VALUE YOUR OF -- THE VALUE OF SUCH USE. NOW, MY UNDERSTANDING IS, IF THAT IS A PROPER FINDING, THAT IS ANOTHER SIGNIFICANT DIFFERENCE IN THE RECORD COMING TO THIS COURT, BETWEEN ALACHUA AND THIS CASE. CAN YOU HELP ME OUT ON THAT.

YES, YOUR HONOR. IT IS NOT A SIGNIFICANT DIFFERENCE IN THE RECORD. IT IS A SIGNIFICANT DIFFERENCE IN THE TRIAL COURT ORDERS. THE RECORD IN THIS CASE, ESTABLISHES THE LACK OF ANY MATERIAL FACTUAL DISPUTE ON WHETHER THE FEE BEING CHARGED AT 6 PERCENT OF REVENUES, CHARGED, IS REASONABLY RELATED TO THE COST OF REGULATION OR RENT, AND I WILL TALK ABOUT THE RENT ISSUE IN A MOMENT. IN FACT, BEFORE THE FIFTH DISTRICT COURT OF APPEALS, WINTER PARK CONCEDED IN ITS BRIEF AT PAGE 38, WINTER PARK NEVER ALLEGED NOR PROVIDED TESTIMONY THAT IT RELATED THE 6 PERCENT FEE TO THE COST OF MAINTAINING THE RIGHTS OF WAY. THE REASON THIS CAME UP WAS BECAUSE, IN DISCOVERY PRIOR TO THE HEARING, WE TOOK THE DEPOSITION OF THE CITY'S WITNESS, WHO SAID WE HAVE NO INFORMATION ABOUT THE COST OF REGULATING FLORIDA POWER'S USE OF THE RIGHTS OF WAY. WE HAVE NO RECORD THAT WOULD INDICATE THIS. THE ONLY BASIS FOR THE 6 PERCENT FEE IS THAT THAT WAS THE AMOUNT AGREED TO IN THE FRANCHISE AND HAS BEEN AGREED TO BY OTHER UTILITIES IN OTHER FRANCHISE AGREEMENTS. THAT IS THE ONLY BASIS. AT THE FINAL HEARING, THE CITY WITNESS OFFERED AN AFTER-THE-FACT JUSTIFICATION, SAYING THE TOTAL COST OF MAINTAINING AND REGULATING ALL OF THE RIGHTS OF WAY, INCLUDING BIKE TRAILS, SIDEWALKS, CURBS, STREETS, TRAFFIC SIGNALS AND SO ON, FOR ALL USES, PEDESTRIANS, THE CITY FIRE VEHICLES, ALL USERS --

AREN'T THOSE THE KINDS OF THINGS THAT YOU WOULD HAVE TAKEN INTO CONSIDERATION, IN REACHING THE FEE FOR THE FRANCHISE AGREEMENT?

NO, YOUR HONOR. THE FEE FOR THE FRANCHISE AGREEMENT IS NOT RELATED TO THE COST OF REGULATING ANYTHING. IT IS A PERCENTAGE OF REVENUES FEE, WHICH BY DEFINITION, IS TIED TO SALES. IT IS NOT TIED BY DEFINITION, TO THE COST OF REGULATING ANYTHING. THE QUID PRO QUO FOR THE FRANCHISE FEE IS WHAT I HAVE {KRID} HAVE. IT STANDS -- IS WHAT I HAVE DESCRIBED. IT STANDS FOR THE PROPOSITION THAT THE COMPANY WILL PROVIDE SERVICE TO WINTER PARK AND THE CITY WILL NOT.

SO UNDER THE FRANCHISE AGREEMENT, THE CITY HAD NO OBLIGATION TO MAINTAIN ITS RIGHTS OF WAY. IS THAT SOMETHING THAT FLORIDA POWER DID SOLELY DURING THE --

{NORBS} YOUR HONOR. THERE ARE REQUIREMENTS -- NO, YOUR HONOR. THERE ARE REQUIREMENTS IMPOSED ON THE COMPANY, BY LAW AND BY ITS AGREEMENT TO MAINTAIN ITS OWN RIGHTS OF WAY, BUT THE CITY HAS POLICE POWER. THIS IS A HEAVILY REGULATED AREA BY THE FLORIDA LEGISLATURE. THE TRANSPORTATION CODE, WHICH DEALS WITH MOVING AND REPAIRS TO RIGHTS OF WAY, ET CETERA, THE CITY HAS POLICE POWER TO MAINTAIN RIGHTS OF WAY. THE COMPANY HAS NEVER CONTENTED THAT THE CITY CANNOT CHARGE BACK TO YOUR POINT, JUSTICE WELLS THAT, THE CITY, THE COMPANY HAS NEVER CONTENTED THAT THE CITY CANNOT CHARGE A REASONABLE REGULATORY CHARGE, GOING FORWARD AFTER THE EXPIRATION OF THE AGREEMENT, COMMENSURATE WITH ITS COSTS OF REGULATING FLORIDA POWER'S USEFUL THE RIGHTS OF WAY.

BUT WHAT YOU ARE REALLY SAYING IS THAT THERE ISN'T ANY WAY THE CITY IS GOING TO BE ABLE TO PROVE IT, BECAUSE REALLY THERE WOULD HAVE BEEN NO REASON FOR THEM, DURING

THE DURATION OF THE FRANCHISE AGREEMENT, TO KEEP SEPARATE RECORDS ON WHAT IT ON COSTS TO -- ON WHAT IT COMES TO SAY MAINTAIN FLORIDA POWER'S AREA OF RIGHT-OF-WAY FROM ANYTHING ELSE, SO THERE JUST WOULD BE A FAILURE OF PROOF.

WHETHER THEY CAN PROVE IT IN THE FUTURE YOUR, THERE CERTAINLY WAS A FAILURE OF PROOF IN THIS CASE, BECAUSE THEY HAD NO RECORDS AND ATTEMPTED NO ANALYSIS. THEY UNDERTOOK NO ANALYSIS OF THEIR COST OF REGULATING FLORIDA POWER'S USE OF THE RIGHTS OF WAY.

SO GOING BACK TO IT, IT IS FREE FOR FLORIDA POWER & LIGHT. FLORIDA POWER CORPORATION.

NO. IT IS NOT FREE, BECAUSE THE CITY HAS THE WHEREWITHAL TO DETERMINE A REASONABLE COST OF REGULATING THE COMPANY'S USE OF THE RIGHTS OF WAY. IT SIMPLY HAS NOT DONE SO BECAUSE IT WANTS TO STAND ON THE 6 PERCENT FEE, WHICH WOULD FAR EXCEED ANY REASONABLE COST OF REGULATION. THE COURT IN ALACHUA COUNTY HELD THAT A 3 PERCENT FEE WOULD EXCEED THE COST OF REGULATION.

WHAT IS THE INDUSTRY STANDARD THEN? IF WE DON'T LOOK AT THE COST OF REGULATION BUT LOOK AT THE INDUSTRY IN THE STATE OF FLORIDA, FRANCHISEE FEES PAID BY UTILITY COMPANIES IN THE STATE OF FLORIDA, WHAT, IS IT IN THE RECORD?

IT IS DIFFICULT TO TALK B A STANDARD IN THE INDUSTRY, THERE ARE A NUMBER OF FRANCHISE AGREEMENTS IN PLACE IN THE STATE. WHAT THE CITY PUT INTO EFFECT WAS A NUMBER OF FRANCHISE AGREEMENTS IN PLACE, BUT THEY ARE BARGAINED-FOR AGREEMENTS, CONTRACTS IN PLACE TODAY BETWEEN UTILITIES AND LOCAL GOVERNMENTS, WHERE THE UTILITIES HAVE AGREED TO A 6 PERCENT, UP TO A 6 PERCENT FRANCHISE FEE. THE PERCENTAGES VARY BUT UP TO A 6 PERCENT FRANCHISE FEE, LESS TAXES AND OTHER IMPOSITIONS, SO THE ACTUAL AMOUNT IN THE FRANCHISE FEE IS NOT EXACTLY 6 PERCENT. IT WILL DIFFER. BUT THAT IS PERHAPS A STANDARD OR A BENCHMARK FOR AGREEMENTS, BUT IT IS NOT A STANDARD OR BENCHMARK FOR COERCIVE FEES OR REGULATORY FEES. IN FACT, THE CITY DEFINES ITS OWN PERMIT FEE AS A FEE THAT WOULD COVER THE COST OF REVIEWING PLANS AND SENDING OUT INSPECTORS, WITH RESPECT TO WORK BEING DONE MR.^CHIEF JUSTICE

YOU WANTED TO BE REMINDED WHEN YOU HAVE FIVE MINUTES LEFT. IT IS YOUR OPTION.

THANK YOU, YOUR HONOR. ONE POINT OF FACT ABOUT THE AGREEMENT IN PLACE, AT THE TIME THE AGREEMENT WAS IN PLACE, THERE WAS CONSENT WITH THE EXPIRATION OF THAT AGREEMENT, WHICH HAD A DEFINITE TERM, WHICH THE PARTIES WERE FREE TO NEGOTIATE A DIFFERENT STORM FOR, THERE IS NO CONSENT, AND THERE HAS TO BE A CONSTITUTIONAL AUTHORITY TO IMPOSE THIS CHARGE ON ACCOMPANY AND NONE EXISTS.

SO WHAT HAPPENS AFTER FRANCHISE AGREEMENTS EXPIRE, THE CITY NO RIGHT TO DEMAND ANY FURTHER PERCENTAGE OF SALES UNDER THE FRANCHISE AGREEMENT, SO WE NOW REVERT TO A SIMPLE COST OF REGULATION, IF THE CITY CAN PROVE IT, AND WHAT IS THE INCENTIVE, THEN, TO RENEGOTIATE THE FRANCHISE AGREEMENT? ARE WE GOING TO BE, IN FLORIDA, THEN, WE TELL CITIES YOU ONLY HAVE ONE CHANCE AT A FRANCHISE AGREEMENT, BECAUSE AFTER THAT EX-
{PIRTION} THE POWER COMPANY ISN'T GOING TO NEGOTIATE THAT AND YOU ARE GOING TO JUST RELY ON YOUR COST OF REGULATION, AFTER THAT AGREEMENT EX-
{SNIRS}.

NO, YOUR HONOR. THE RECORD SHOWS THAT THIS COMPANY WAS WILLING TO NEGOTIATE ANOTHER FRANCHISE AGREEMENT TONIGHT PAY THE 6 PERCENT. THEY JUST DIDN'T WANT TO GIVE A BUY-OUT PROVISION, BECAUSE THEY WANTED TO CONTINUE TO SERVE THE CUSTOMERS IN WINTER PARK.

OTHER CONTRACT, UNJUST ENRICHMENT, OTHER KINDS OF THEORIESIES AND JURISDICTION?

OTHER THEORIES HAVE GONE BY THE WAY, BECAUSE WHERE THE AUTHORITY WAS CONTINUING TO COLLECT THE FRANCHISE FEE FROM ITS CUSTOMERS AND NOT REMITING IT TO THE CITY, IT IS VERY DISTINGUISHABLE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS STUMPY HARRIS WITH GRAY HARRIS. I AM HERE ON BEHALF OF THE CITY OF WINTER PARK. I HAVE WITH ME HERE AT COUNSEL TABLE, MY PARTNER MR. TRACI MARSHAL AND IN TOM CLOUD.

NO AGREEMENT NEW YORK CITY FEE?

WELL, I HAVE CAST THAT AS, IF YOU ARE GOING TO STAY, YOU HAVE GOT TO PAY. I THINK THAT IS A BETTER SUMMARY OF WHAT IS GOING TO GO ON HERE.

LET ME ASK YOU TO DISCUSS THE LEGAL BASIS HERE, FOR THE TRIAL JUDGE ENTERING AN INJUNCTION. DOESN'T APPEAR, FROM THE ORDER, THAT THE TRIAL JUDGE COVERED WHAT THIS COURT HAS REQUIRED IN THE ENTRY OF AN INJUNCTION, AND HOW IS, DOES THIS FIT WITHIN THAT REMEDY, ESPECIALLY AS TO THEIR NOT -- AS TO THERE NOT BEING THE AVAILABILITY OF DAMAGES?

WELL, YOUR HONOR, WHAT YOU ARE DEALING WITH IN IT PARTICULAR CASE, I BELIEVE -- WHAT YOU ARE DEALING WITH IN THIS PARTICULAR CASE, I BELIEVE, IS UNAUTHORIZED APPROPRIATION OF THE CITY'S PROPERTY. THERE IS A TREMENDOUS AMOUNT OF FOCUS, AND I WILL TELL YOU THE COURT I HAVE VIEWED THE ALACHUA ARGUMENT SEVERAL TIMES, AND THERE WAS A TREMENDOUS AMOUNT OF FOCUS THERE, ON THE USE OF THE RIGHT-OF-WAY, AND OF COURSE, THE REASON WAS THAT COUNTIES DON'T HAVE AN APPROPRIATE OTHER RIGHT TO -- A PROPRIETY OTHER RIGHT TO SUPPLY THEIR CITIZENS. THE CHAIN IS QUITE DIFFERENT FOR THE CITY, SO ALL OF THE CITIES, CONSTITUTIONALLY, ARTICLE VIII SECTION 2-B, CONSTITUTIONALLY HAVE PRO PRIORTARY RIGHTS, AND ONE OF THOSE, WHICH THIS COURT HAS CONFIRMED EVERY OPPORTUNITY IT HAS TO FACE THE ISSUE, IT HAS PROGRESS -- PREROGATIVE TO PROVIDE UTILITIES FOR ITS CITIZENS, AND WHAT DETERMINES --

THAT IS NOT MY FIRST CONCERN, THOUGH. MY FIRST QUESTION IS HOW, WHEN THERE IS A CONTRACT, AND THAT CONTRACT IS EXPIRED, WHERE DOES THE COURT GET THE POWER TO ORDER THAT, THE TERMS OF THAT CONTRACT BE CONTINUED? IS THERE PRECEDENT TO THIS COURT DOING THAT?

ALL OF THE PRECEDENT THAT TAKES THE SITUATIONS IN WHICH YOU IMPLY A CONTRACT, THAT IS WHY WE CITED LAST CRUISE AS, BECAUSE THE -- WE CITED LAS CRUSAS, BECAUSE THE COURT FROM HAD DECIDED THE PAYMENT OF FEES AFTER THE CONTRACT HAD EXPIRED. THAT IS THIS COURT AND THE PFC PASSING IT ON TO THE CUSTOMERS. IT IS NOT AN INDICIA OF TAX AT ALL IN THIS SCENARIO. WHAT HAPPENED WAS, IS THAT COURTS LOOK AT THESE FRENCHIESES, AND YOU RECOGNIZE -- FRENCH I SEE, AND YOU RECOGNIZE THERE -- THESE FRANCHISES, AND YOU RECOGNIZE THAT THERE ARE TWO VERY IMPORTANT RIGHTS, TWO PROPERTY INTERESTS THAT ARE BEING BARGAINED AWAY, AND REMEMBER IN ALACHUA THEY SPECIFICALLY SAID THERE ARE NO PROPERTY RIGHTS BEING BARGAINED AWAY. THAT IS A STIPULATION COMING INTO THIS COURT AND HERE THERE IS NO SUCH STIPULATION, AND THOSE RIGHTS THAT I WOULD FOCUS THE COURT'S ATTENTION ON IS THE APPROPRIATE OTHER RIGHT THAT COMES OUT -- THE PROPRIETARY RIGHT THAT COMES OUT OF THE CONSTITUTION, TO A FRANCHISE FEE.

MY QUESTION IS WHY AN INJUNCTION ISN'T, MAYBE MORE OF A THRESHOLD QUESTION, WHY ISN'T AN INJUNCTION THE APPROPRIATE REMEDY? WHY ISN'T THIS SOMETHING THAT THERE IS AN ADEQUATE REMEDY IN DAMAGES?

WELL, YOUR HONOR, I DON'T THINK THERE IS AN ADEQUATE REMEDY IN DAMAGES, AND IN THIS

PARTICULAR INCIDENCE, ONE OF THE STANDARDS THAT THE COURTS ALWAYS LOOK TO IS WILL TAKING AN ACT TO PRESERVE THE STATUS QUO WHILE THE PARTIES WORK OUT THEIR DISPUTE, GOING TO PREVENT A MULTIPLICITY OF LITIGATION? HOW OFTEN WOULD I ADVISOR ANYONE ADVISE WINTER PARK TO SUE THEM OVER THAT? EVERYDAY? EVERY WEEK? EVERY MONTH? THE BILLS COME OUT ONCE A MONTH. THE PEOPLE THAT OWE THAT MONEY, THAT IT IS BEING PASSED THROUGH, BY SANCTION OF THIS COURT AND THE PSC, CHANGE, SO IS IT THE OBLIGATION OF FLORIDA POWER? WE WOULD OBVIOUSLY CONTEND THAT IT WAS, BUT THEY WILL DISPUTE. THAT.

HOW LONG DOES THIS INJUNCTION REMAIN IN EFFECT?

IT IS NOT INDEFINITE. IT SAYS UNTIL THE ARBITRATION PROCEEDS. REMEMBER THIS LAWSUIT WAS BECAUSE THEY WOULD NOT HONOR THEIR WORD. WE ASKED THEM TO ARBITRATE THE PURCHASE PRICE, SO WE COULD MAKE A DETERMINATION IF WE WOULD EXERCISE OUR CONTRACTUAL OPTION TO PURCHASE AT THE CONCLUSION OF THE FRANCHISE. REMEMBER THAT THIS SYSTEM BELONGED TO WINTER PARK. THEY BOUGHT IT. GAVE BACK THE OPTION TO PURCHASE IT. THERE HAS BEEN EVERY SINGLE FRANCHISE. WHEN THIS ONE EXPIRED, THEY SAY WE DON'T DO THAT ANYMORE. SORRY. WE ARE JUST NOT GOING TO DO THAT. THAT WAS THE STICKING POINT IT WASN'T 6 PERCENT OR ANYTHING ELSE -- POINT. IT WASN'T 6 PERCENT OR ANYTHING ELSE. SO IF YOU -- IT WASN'T THE STICKING POINT OR ANYTHING ELSE. SO IF YOU LOOK AT THE COURT ORDER, FRANKLY I THINK HE DID AN ADMIRABLE JOB, FACING THE DIFFERENCES IN ALACHUA, BUT HE SAID IT WILL BE FURTHER ORDER OF THE COURT, EITHER UNTIL THEY RESOLVE THE DISPUTE, GET TO ARBITRATION AND MAKE A DETERMINATION WITH A PURCHASE OR NOT, OR RESOLVE THE DISPUTE, SO IT IS NOT AN INDEFINITE PURPOSESUIT EXTENSION OF THE CONTRACT. -- PERTAIN US EXTENSION OF THE CONTRACT. IT IS ONE OF THE ARGUMENTS OF THE DISPUTE.

IS ONE OF YOUR ARGUMENTS HERE THAT FLORIDA POWER COMPANY IS GETTING THE BENEFIT OF THE MAINTENANCE OF THE STATUS QUO, WITH THE EXCEPTION OF -- THE STATUS QUO, WITH THE EXCEPTION OF THE PROVISION, AND IS THAT HIGHLY INEQUITABLE? I GAVE A SORT OF LEADING QUESTION THERE, BUT I WANT TO KNOW YOUR RESPONSE TO THAT.

MY RESPONSE, OF COURSE, IS CORRECT BUT I CAN ADD TO THAT. FLORIDA POWER MAKES THE ARGUMENT THAT WHAT WE BUY IS 30 YEARS APIECE. HOW MUCH IS THAT WORTH THE FIRST DAY? A LOT MORE THAN IT IS THE DAY BEFORE THE FRANCHISE EXPIRES. IF YOU WANT TO LOOK AT IT LIKE THAT. WHAT THEY ARE BUYING, THEY HAVE NOW GOT ALMOST 33 HERE. THEY ARE WORKING ON THEIR 33d YEAR IN WHICH THEY HAVE GOT THIS SITUATION WITH THIS FRANCHISE. ALL OF THE BENEFITS, ALL OF THE PROFITS THAT THEY ARE ALLOWED TO MAKE BY OPERATING THE SYSTEM AND SELLING ELECTRICITY TO THE CITIZENS OF WINTER PARK, IS STILL FLOWING INTO THEIR POCKETS AT THIS MOMENT. IT WOULD BE EXTRAORDINARILY INEQUITABLE AND NOT A GOOD USE OF JUDICIAL TIME, TO REQUIRE THE CITY TO SUE ON A WEEKLY, DAILY, MONTHLY, WHATEVER BASIS TO COLLECT IT, TO COLLECT THAT MONEY.

THEN LET ME GO BACK TO, THEN, ARE YOU SAYING THAT THE 6 PERCENT IS NOT JUST FOR THE REASONABLE VALUE OF THE, OF WHAT IT COSTS THE CITY TO MAINTAIN IT, BUT THERE IS SOME PERCENTAGE OR SOME AMOUNT DURING THE HOLD OVER PERIOD, THAT SHOULD REPRESENT THE FACT THAT FLORIDA POWER STILL HAS THE EX-CLUSIVE RIGHT TO SUPPLY THE ELECTRICITY, AND HOW DO WE MAKE, IS THERE A FINDING ON THAT? HOW DO WE MAKE THAT DISTINCTION?

FIRST OF ALL, YOU HAVE TO LOOK TO ALL OF THE DECISIONS AND WHAT THE LAW IS, AND YOU HAVE TO LOOK TO THE CONSTITUTION OF IT.

I REALLY WANT AS FAR AS YOUR CONTENTION IN THIS CASE.

THERE ARE TWO PROPERTY RIGHTS THAT ARE SIGNIFICANT. THE REAL THING THAT IS BEING TRANSFERRED IN A FRANCHISE, IS THE RIGHT TO THE MONOPOLY.

WELL, THAT IS WHAT MR. SASSO SAID.

THAT'S RIGHT. AND THAT CONTINUES TO THIS MOMENT.

SO IS IT --

-- WHILE THE DISPUTE IS BEING RESOLVED.

DID THE TRIAL COURT MAKE FINDINGS AS TO WHAT, THEN, OF THE 6 PERCENT? DOES IT ALL REPRESENT -- OF THE 6 PERCENT? DOES IT ALL REPRESENT THE EXCLUSIVE MONOPOLY RIGHT OR DOES IT REPRESENT COST OF MAINTAIN SOMETHING.

YOUR HONOR, THE TRIAL COURT TOOK IT A STEP FURTHER THAN IS REALLYNESSES AREA. THE TRIAL COURT SAID THAT -- THAN WAS REALLY NECESSARY. THE TRIAL COURT SAID THAT, WITH NINE MONTHS OF THE YEAR AND ROUGHLY TEN DOWN CALLS AND FIRE TRUCKS AND POLICEMEN AND ALL OF THE STUFF THAT DOWN LINES MEAN, ALL OF THAT THAT HE FOUND, AFTER LISTENING TO ALL OF THE EVIDENCE, LISTENING TO ALL OF THE OBJECTIONS AND HAVING A TRIAL, THIS WAS A BENCH TRIAL, AND AFTER THAT TRIAL, HE MADE FINDINGS, AND THOSE FINDINGS WERE THAT IT WAS REASONABLY RELATED. HE DID NOT, IT WASN'T NECESSARY FOR HIM TO GO THAT FAR, BUT THAT IS WHAT THE RECORD SAYS IN THIS CASE. I WOULD ADD TO THAT, THAT WHAT IS REALLY GOING ON HERE, WHAT IS REALLY BEING EXCHANGED FOR THE 6 PERCENT IS THE RIGHT TO THE MONOPOLY, AND JUST BECAUSE THE FRANCHISE ENDS DOESN'T MEAN THEY GET THAT FREE. THAT IS THE WHOLE POINT OF DISSENT IN ALACHUA.

DOES THE CITY HAVE THE RIGHT TO EVICT THEM IN THIS CASE? I MEAN, IS THERE --

YOUR HONOR, WE HAVE PONDERED THAT QUESTION, AND IF YOU THINK ABOUT IT IN THE GRAND SCHEME OF THINGS, IS IT IN THE PUBLIC INTEREST?

IS THERE A LEGAL RIGHT? DO YOU CONTEND THERE IS A LEGAL RIGHT?

I DO NOT BELIEVE SO. I BELIEVE THAT THE USEFUL THE PUBLIC RIGHT-OF-WAY IS ANCILLARY TO WHAT, REALLY, THE 6 PERCENT IS BEING PAID FOR, AND THAT THERE IS PUBLIC RIGHT-OF-WAY. FLORIDA POWER CALLS IT IS A STATIC USE. I DON'T KNOW IF THAT IS A PLAY ON WORDS OR NOT, BUT AT LEAST IT IS AN IN-THE-GROUND KIND OF USE, VERY EXTRAORDINARY, BECAUSE MOSTLY RIGHT-OF-WAY IS USED TO COME TO AND FRO.

SO WOULD THE CITY BE ABLE TO, IF THEY WEREN'T HAPPY WITH THE WAY FLORIDA POWER CORPORATION IS ACTING, IS TO GO AHEAD AND GIVE THE EXCLUSIVE RIGHT TO SUPPLY ELECTRICITY TO ANOTHER ENTITY?

YOUR HONOR, I DON'T, I THINK THAT THEY COULD AWARD THAT. THERE WILL BE A LOT OF PROBLEMS AND WHAT WOULD HAPPEN AND HOW TO ENFORCE THAT. NO ONE, FLORIDA POWER NOR THE CITY OF WINTER PARK, WANTS THE LIGHTS TO GO OUT, AND WE DON'T WANT, WINTER PARK HAS APPROACHED THIS THING, I BELIEVE, IN THE MOST REASONABLE WAY. WE SAID WE INSIST, WE OFFERED THE VERY SAME FRANCHISE WITH THE OPTION TO PURCHASE, SINCE IT WAS OURS IN THE FIRST PLACE, AND THEY TOLD US TO GO BAG IT, SO NO DISPUTE OVER THE 6 PERCENT AND NO DISPUTE OVER ANY OF THE OTHER TERMS. WE SAID GIVE IT US TO. THEY SAID NO. WE EXTENDED IT FOR A FEW MONTHS TO TRY TO KEEP NEGOTIATING AND THEY SAID NO. WE SAID, OKAY, WE ARE GOING TO EXERCISE OUR OPTION TO PURCHASE. GIVE US A PRICE. WE HAD TO SUE THEM TO MAKE THEM DO THAT. THE FIFTH, YOU KNOW, THE CASSELBERRY CASE WHICH THEY DID NOT APPEAL, FINDS THAT THEY MUST, THEY HAVE A LEGITIMATE AGREEMENT TO SELL TO US AND TO DETERMINE THE PURCHASE, THEY WERE NEVER GIVEN A SURPRISE.

SO ARE YOU SAYING THEN, AND IN PARTIAL ANSWER TO THAT QUESTION, THAT UNDER THE FRANCHISE AGREEMENT, ONLY THE CITY HAS THE RIGHT TO COME BACK IN AND SUPPLY ELECTRICITY, BY BUYING OUT THE FLORIDA POWER CORPORATION, THEY COULDN'T JUST SAY FLORIDA POWER CORPORATION, YOUR FRANCHISE IS OVER. WE ARE GOING TO GIVE THIS TO SOME OTHER GROUP?

YOUR HONOR, AT ONE LEVEL, THE ANSWER TO YOUR QUESTION IS OF COURSE THEY CAN. THIS IS A CONSTITUTIONAL APPROPRIATE OTHER -- PROPRIETARY RIGHT THAT BELONGS TO THE CITY OF WINTER PARK. THE ABILITY TO PROVIDE ELECTRICAL SERVICES TO THEIR CITIZENS IS THEIRS TO FRANCHISOR TO DO, THEMSELVES.

SO THEY COULD MAKE A DEAL WITH ORLANDO UTILITIES.

THEY COULD MAKE A DEAL WITH ORLANDO UTILITIES. THERE COMES A QUESTION, THOUGH, OF HOW YOU DEAL WITH THE POLLS AND -- WITH THE POLES AND WIRES THAT ARE IN PLACE, THAT FLORIDA, THAT THAT IS THE SUBJECT MATTER OF THE PURCHASE OPTION. THE VALUE OF THOSE POLES AND WIRES. NOW, WHAT HAPPENS --

THAT FLORIDA POWER INSTALLED.

YEAH. YES, MA'AM. IF YOU, YES, YOUR HONOR, IS THE MORE PROPER WAY TO ANSWER THAT QUESTION. IF YOU, YOU KNOW, I HAVE BEEN THIS WAY A LONG TIME, IF YOU LOOK AT THE OVERALL SCENARIO, ONE OF THE THINGS I WAS GOING TO TALK ABOUT THREE POINTS, WHAT THIS CASE IS AND WHAT THIS CASE IS NOT AND THEN WHAT IS GOING ON HERE IN THE BIG PICTURE, AND YOUR QUESTIONS STRIKE AT WHAT IS GOING ON HERE IN THE BIG PICTURE, BECAUSE IN THE BIG PICTURE YOUR OF THINGS, YOU SEE THIS NATURAL PROGRESSION, AND NOW FLORIDA POWER IS TAKING THE POSITION THAT IT WILL NOT GRANT THE CITY OF WINTER PARK A PURCHASE OPTION. WHEN THE TIME CAME, THEY SAID NO. SO THE CITY GOES ON TO EXERCISE THEIR OPTION. THEY MAKE A CHOICE WITH THE POSSIBILITIES. I THINK THAT THE LOGICAL EXTENSION OF THEIR ARGUMENT THAT PUBLIC RIGHT-OF-WAY HAS SOME SPECIAL PUBLIC INTEREST, THEY MIGHT I AM PALE THEMSELVES OF -- THEY MIGHT IMPALE THEMSELVES OF THAT ARGUMENT, BECAUSE THE CONCLUSION IS THAT THE LINES ARE DEDICATED TO THE USE OF THE PUBLIC, PERIOD, BUT THAT ARGUMENT HAS NOT BEEN MADE, BECAUSE WINTER PARK CONTRACTUALLY IS BOUND TO PAY THEM THE VALUE OF THOSE AND THE FRANCHISE AGREEMENT. THE THEORY OF THE WHOLE FRANCHISE, THEY HAVE HAD THIS NOW FOR 71 YEARS PLUS, AND THE THEORY IS PRIVATE COMPANY, YOU CAN COME IN, YOU CAN MAKE THE INVESTMENT, YOU CAN MAKE PROFITS, WHICH GUARANTEED RIGHT AT THIS MOMENT AT 12 PERCENT OF THEIR INVESTMENT. YOU CAN MAKE THOSE PROFITS FROM SELLING THE ELECTRICITY YEAR AFTER YEAR AFTER YEAR. MAYBE AN ARGUMENT CAN BE MADE AT SOME POINT, THIS REALLY DOES BELONG TO THE PEOPLE, BUT WINTER PARK IS NOT MAKING THAT ARGUMENT. THEY ARE NOT ATTEMPTING TO MAKE AN UNILATERAL AGREEMENT WITH OUC OR ANY OTHER POWER SUPPLIER, TO START USING THOSE LINES BUILT AND PUT IN BY WINTER PARK, BECAUSE THEY HAVE A CONTRACTUAL OBLIGATION UNDER THE FRANCHISE, TO PURCHASE THOSE, AND THAT IS WHAT THEY ARE IN THE PROCESS OF EXECUTING.

WHAT IS YOUR THEORY? THE FRANCHISE AGREEMENT IS EXPIRED. WHAT IS YOUR THEORY AS TO THE AUTHORITY TO AWARD A SUM OF MONEY? IS IT IMPLIED CONTRACT? IS IT AN EQUITY ARGUMENT? WHAT IS THE THEORY?

IT IS ALL OF THE ABOVE. I WOULD BE HAPPY TO GIVE YOU, THE BEAUTY OF THE COMMON LAW, YOUR HONOR, IS THAT IT HAS MULTIPLE PRINCIPLES AND THEORIES THAT CAN BE APPLIED TO THE UNIQUE FACTUAL SITUATION THAT THE COURT IS FACED WITH OR ANY COURT IS FACED WITH, SO YOU HAVE GOT IMPLIED CONTRACT. NOW, YOU ARE NOT INTERESTED IN MY PERSONAL OPINION, BUT I WILL GIVE IT TO YOU. MY PERSONAL OPINION IS IMPLIED CONTRACT IS THE

BETTER OF ALL OF THE THEORIES. THAT THAT IS THE BETTER APPROACH. THEY ARE GETTING ALL THE BENEFITS. THEY CLAIM WE DON'T HAVE UNDISTURBED POSSESSION AFTER 1971, WHEN, WHENEVER IT EXPIRED, 2001. WE DON'T HAVE THAT, BUT THEY BARGAINED FOR NOT HAVING THAT, WHEN IT CAME TO A CONCLUSION. YOU KNOW, THEY CAN'T BE --

YOU SAID UNDISTURBED, MEANING THAT THERE IS LITIGATION. IS THERE ANYTHING ELSE THAT HAS BEEN CHANGED?

THE ONLY DISTURBANCE THAT IS GOING ON HERE IS US EXERCISING OUR CONTRACTURAL OPTION TO TRY TO -- THAT IS THE ONLY REASON THEY SUED US IS BECAUSE THEY TOLD US THEY WOULD NOT GIVE WAS PRICE. WOULD NOT SELL IT TO US. IT IS NOT FOR SALE AND WOULDN'T ARBITRATE IT, BECAUSE WE DIDN'T HAVE THE RIGHT TO, AND THEY DID THE SAME THING IN SEVERAL OTHER CITIES, AND IN CASSELBERRY WE PERSUADED THE FIFTH DISTRICT COURT OF APPEAL THAT THEY DID. WE WON THE TRIAL ON THAT AND GOT THE ORDER FROM THE FIFTH DISTRICT COURT OF APPEAL ON THEIR APPEAL AND THEY DIDN'T GO ANY FURTHER, TRY TO TAKE IT ANYWHERE OR DO WHATEVER OR WHATEVER. THEY JUST ACCEPTED IT AND STIPULATED IN THIS CASE, BECAUSE OF CASSELBERRY, THEY WERE BOUND BY IT.

DO YOU, THE CASES HERE, A COUPLE OF REASONS, BUT IS THERE CONFLICT WITH BEL-AIR? DOES BEL-AIR HAVE TO BE DISAPPROVED OF, IF WE APPROVE THE FIFTH DISTRICT CASE?

DOESN'T HAVE TO AM -- DOESN'T HAVE TO BE.

WHY NOT?

BECAUSE DIDN'T HAVE ANY EVIDENCE, DIDN'T HAVE A TRIAL, DIDN'T HAVE ANY FINDINGS. THE BEL-AIR RECORD, YOU TAKE BEL-AIR, ALACHUA IN THIS CASE, AND YOU SEE HUGE DIFFERENCES IN ALACHUA, ALL OF THE MEANINGFUL STUFF WAS STIPULATED AWAY. THAT WAS A BOND VALIDATION. THE ROOM WAS FULL OF TAX MAYORS. THERE ARE NONE -- TAXPAYERS. THERE ARE NONE HERE TODAY. THAT WAS ANOTHER THING GOING ON, AND YOU HAVE TO ADMIT THAT ALACHUA DIDN'T SMELL REAL GOOD. YOU KNOW, THEY WANTED 3 PERCENT, AND THEY WERE GOING TO PAY THE POWER COMPANY 1 PERCENT OF THAT, A THIRD, TO BE A CONDUIT, TO COLLECT IT, ALMOST AS IF, IT SMELLED AS IF MAYBE THERE WAS SOME KIND OF BUY OFF GOING ON HERE. I UNDERSTAND HOW THE COURT WOULD DO WHAT IT DID. AND I ALSO UNDERSTAND AND AGREE WITH COMPLETELY, THE, JUDGE OVERTON'S DISSENT IN THERE, BECAUSE THAT IS EXACTLY WHAT HAS HAPPENED. IT IS PATHETIC WHAT WAS SAID IN THAT DISSENT, AND I THINK THE CHIEF JUSTICE AGREED WITH THAT DISSENT, BUT WE, THAT CASE HAD STIPULATED FACTS, STIPULATED FINDINGS. I MEAN, BOB NABORS WAS IN A BOX FROM THE GET-GO WITH THAT ONE, BECAUSE THEY DON'T HAVE THE INHERENT PROPRIETARY RIGHT TO SERVE CLIENTS ELECTRICITY.

IN BEL-AIR THE COURT WAS WITHOUT AUTHORITY TO ORDER THE FPC TO CONTINUE TO PAY UNDER THE FRANCHISE AGREEMENT. THE CONTRACT AFTER ITS EXPIRATION, THE CONTRACT CANNOT BE EXTENDED. ISN'T THAT WHAT THE TRIAL COURT AFFIRMED AND WHAT THE TRIAL COURT DID HERE?

TO THE EXTENT THAT THAT IS A RELYING FACTOR IN BEL-AIR THAT NEEDS TO BE REVERSED, BECAUSE THAT IS EXACTLY WHAT COURTS OUGHT TO HAVE THE POWER TO DO, SITTING IN EQUITY AFTER A FULL TRIAL. BEL-AIR DID NOT HAVE A TRIAL. YOU HAVE GOT SOME KIND OF A RULING, AS A MATTER OF LAW. HERE WE HAD A FULL BENCH TRIAL. WE HAD FINDINGS OF FACT THAT --

ARE WE GOING TO LIMIT THAT RULING TO UTILITY OR ANY SITUATION, OR DOES ANYBODY THAT ENTERS INTO A CONTRACT AND IT TERMINATES, IS SUBJECT TO A COURT ENTERING AN INJUNCTION THAT THEY HAVE GOT TO CONTINUE THE CONTRACT?

I DON'T THINK, YOUR HONOR, THAT IS CORRECT. THERE IS SOME STANDARDS SET FORTH THAT ARE EASILY MET FOR IMPLIED CONTRACT. YOU HAVE ONE PARTY CONTINUING TO ACCEPT ALL OF THE BENEFITS OF THE CONTRACT. THE STATEMENT BY THE DISSENT AND, IN THE FIFTH AND BEL-AIR THAT THEY WEREN'T GETTING THE SAME THING ANYMORE, IS NONSENSE. THEY ARE MAKING ALL THE SAME MONEY THEY HAVE BEEN MAKING FROM DAY ONE, AND THEY ARE EXPERIENCING THE VERY RISKS THEY CONTRACTED FOR, FROM DAY ONE. SO FLORIDA POWER IS GETTING EVERY SINGLE BENEFIT. THAT GIVES RISE, IF YOU WON'T LEAVE, IF YOU WON'T SELL, IF YOU WON'T DO ANYTHING BUT CAUSE LITIGATION, THERE CAN BE AN ORDER ENTERED UNDER IMPLIED CONTRACT THEORY THAT EXTENDS THE CONTRACT TEMPORARILY, UNTIL THOSE DISPUTES ARE RESOLVED. THAT IS AN IMPLIED CONTRACT. YOU CAN USE QUANTUM MERIT. YOU CAN USE HOLD OVER TEN ANSWER I. THAT IS WHAT THE TRIAL -- TENANCY. THAT IS WHAT THE COURT DID IN OUR CASE. IT IS REALLY NOT MR. CHIEF JUSTICE

WE ARE GOING TO HAVE TO WRAP UP ON THOSE COMMENTS. THANK YOU AM.

YOUR HONOR, I AM GOING -- THANK YOU.

YOUR HONOR, I AM GOING TO WRAP UP BY SAYING THIS COURT SHOULD AFFIRM THE WINTER PARK DECISION.

CHIEF JUSTICE: COUNSEL, HOW MUCH TIME LEFT? WOULD YOU ADDRESS THAT LAST STATEMENT AS RELATES TO THE FACT THAT YOU ALL ARE STILL RECEIVING ALL OF THE BENEFITS OF THIS CONTRACT, BUT WITHOUT MAKING THE AGREEMENT THERE, AND I THINK THAT IMPLIES SOME KIND OF ECONOMIC OR, REALLY, PUBLIC, ALMOST, AND BLACKMAIL IS NOT THE WORD, BUT COERCION HERE, THAT IS THAT, BECAUSE THE CITY HAS AN OBLIGATION TO SEE THAT ITS CITIZENS STILL RECEIVE THIS POWER, THAT THEY HARDLY HAVE, YOU KNOW, MANY OPTIONS OTHER THAN LETTING YOU CONTINUE TO PROVIDE THIS, BUT DO WE HAVE AN INEQUITABLE SITUATION, WHERE YOU ALL CAN GO ON INDEFINITELY HERE AND STILL RECEIVE ALL THESE, ALL THE BENEFITS AND NOT HAVE TO PAY THIS THIS FEE THAT WAS PREVIOUSLY BEING PAID?

YOUR HONOR, THE CRUX OF THIS AM FRANCHISE AGREEMENT IS NOT THE LEASING OF RIGHTS OF WAY, WHICH THE CITY IS EMPOWERED TO DO.

LET ME PUT IT THIS WAY, WHAT BENEFITS OF THE CONTRACT THAT YOU HAD ARE YOU NOT ENJOYING TODAY?

TO PROVIDE SERVICE WITHOUT OPPOSITION OR INTERFERENCE BY THE CITY.

WHAT INTERFERENCE? YOU ARE NOT TALKING ABOUT THE CITY HAS GOT A FIRE TRUCK OUT THERE WITH ITS LADDER GOING UP YOUR POLES AND CUTTING, YOU KNOW, THE THINGS OR DOING ANYTHING LIKE THAT. YOU ARE NOT, IF I UNDERSTAND YOU CORRECTLY, YOU ARE NOT TALKING ABOUT ANYTHING THAT CONSTITUTIONALLY INTERFERING WITH THE DELIVERY OF POWER, ARE YOU?

THAT'S CORRECT, YOUR HONOR. WHAT IS TAKING PLACE, AS COUNSEL DESCRIBED DESCRIBED, IS THE CITY HAS TAKEN STEPS TO -- AS COUNSEL HAS DESCRIBED, IS THE CITY HAS TAKEN STEPS TO BUY THE SYSTEM, WHICH IS FUNDAMENT DURING THE PERIOD OF THE FRANCHISE. NOW, THE QUESTION IS --

I DIDN'T THINK YOU DISPUTED THE PROVISION IN THE AGREEMENT THAT GAVE THEM A BUY BACK. DO YOU DISPUTE THAT?

THAT IS EXACTLY RIGHT, YOUR HONOR. THAT TAKES PLACE. THAT IS TRIGGERED.

DO YOU DISPUTE THAT?

NO, YOUR HONOR, THAT IS IN THE AGREEMENT, BUT THAT IS WHAT DISTINGUISHEST ARRANGEMENT BETWEEN PARTIES DURING THE -- DISTINGUISHES THE ARRANGEMENT BETWEEN THE PARTIES DURING THE AGREEMENT. THE CITY COULD HAVE HAD HOLD OVER RIGHTS AND IT DID NOT. IT BARGAINED FOR THE HOLD OVER AGREEMENT WHICH SAYS AFTER THE EXPIRATION OF THE AGREEMENT THAT THE CITY MAY BUY BACK, WHICH CONTEMPLATES A GAP BETWEEN EXPIRATION AND BUY BACK AND THERE WAS NO PROVISION FOR PAYING OF FEES DURING THAT PERIOD. THE --

THE QUESTION IS, PER JUSTICE ANSTEAD, IS WHAT BENEFITS ARE YOU RECEIVE SOMETHING YOU SAID THEY ARE INTERFERING BECAUSE THEY ARE TRYING TO BUY US BACK. YOU APPEAR TO BE SAYING WE DON'T PAY THEM BECAUSE WE DON'T HAVE TO PAY THEM, AND IF YOU WOULD JUST LEAVE US ALONE, WE WOULD PAY THEM.

NO, YOUR HONOR, IT IS LIKE AN AGREEMENT BETWEEN TWO COMPANIES NOT TO COMPETE, IN ESSENCE, AND WHEN THE AGREEMENT IS TERMINATED, THE SECOND COMPANY STARTS COMPETING, AND THAT IS WHAT IS TAKING PLACE HERE. THE CITY IS ATTEMPTING TO COMPETE WITH THE COMPANY'S ASSERTION OF ITS RIGHT TO SERVE IN WINTER PARK.

THE CITY REALLY DOESN'T HAVE THE ABILITY, DO THEY, REALISTICALLY, IN OTHER WORDS, THIS ISN'T AS IF THEY CAN CONSTRUCT ANOTHER POWER PLANT OUT ON THE EDGE OF TOWN AND CONNECT IT UP TO THIS EXISTING GRID. THAT REALLY ISN'T A REALISTIC POSSIBILITY IN IN CASE, IS IT?

THAT'S CORRECT, YOUR HONOR. THEY HAVE TO BUY BACK THE SYSTEM, BUT THE REAL ISSUE HERE IS WHERE IS THE SOURCE OF THEIR LEGAL POWER TO COERCE OR IMPOSE A FEE DURING THIS INTERIM PERIOD? THE COURT CAN ONLY DO SO BY COURT ORDER, IF THERE IS A CLEAR LEGAL RIGHT. THE CASES ON WHICH THE FIFTH DISTRICT COURT OF APPEALS RELIED UPON WERE THE CASES WHERE PARTIES HAD AN EXISTED -- AN EXISTING AGREEMENT AND MAINTAINING THE STATUS QUO, MAINTAINING THE EXISTING AGREEMENT. THAT EXPIRED.

ON THE INJUNCTION ISSUE.

ON THE INJUNCTION ISSUE BUT IT ALSO GOES TO A REGULATORY TAX OR ANYTHING ELSE. THERE HAS TO BE MR.^CHIEF JUSTICE

WE HAVE TO TAKE IT FROM HERE AND APPRECIATE THE TIME THAT YOU HAVE SPENT RELATING TO THE COURT'S QUESTIONS. THANK YOU VERY MUCH.