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BIRCH RODS IN THE CUPBOARD: THE LINK BETWEEN MUNICIPAL FRANCHISE PURCHASE OPTIONS AND FRANCHISE FEES IN FLORIDA

Thomas A. Cloud*

I. INTRODUCTION

In 1999, the Florida Supreme Court rendered a decision invalidating an "Electric Utility Privilege Fee" imposed by Alachua County upon electric providers using the County's rights-of-way to deliver electric service.[1] The Court took the case on appeal of a circuit court order withholding validation of bonds to be issued by the County based upon such fees.[2] Relying on a stipulated record

 Partner, GrayRobinson, P.A., Orlando, Florida. B.A., History, *magna cum laude*, Wake Forest University, 1976; J.D., Florida State University College of Law, 1979. Mr. Cloud is the head of the firm's Public Law Department and has extensive experience in local government, environmental, land use, and utilities law. He has represented dozens of Florida counties and cities in a variety of local government, utility, annexation, and land use matters, including territorial disputes, acquisitions, purchase option arbitrations, rate cases, complex transactions, and complex litigation. Mr. Cloud is a member of the Florida Municipal Attorneys Association, the Florida City, County, and Local Government Law Section, and the Florida Environmental and Land Use Law Section (ELUL) of the Florida Bar. He chaired the ELUL Section from 1987 to 1988.

The Author has extensive practical experience in the fight over municipal franchise fees. He represented the cities of both Casselberry and Winter Park in their legal battles with Florida Power Corporation. As a result, much of the background for this Article was obtained through Mr. Cloud's own personal experience and litigation research.

The Author humbly dedicates this Article to those city officials—elected and appointed—who stayed the course to seeing *Alachua* revisited.

1. *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999).

2. *Id.* at 1066.

largely devoid of factual support for a valid fee, the Florida Supreme Court rejected the fee by applying seven criteria to the record.[3] These criteria included the relationship of the fee to (1) the extent of use of the right-of-way by the utility; (2) "the reasonable rental value of the land" occupied by the utility; (3) the local government's costs of regulating the utility's use of the right-of-way; (4) the cost of maintaining the portion of the right-of-way used by the utility; (5) the fee's origin (i.e., bargained-for agreement vs. unilateral imposition); (6) the utility's ability to avoid the fee by removing or relocating its equipment; and (7) the use by the local government of the revenue derived from the fee.[4]

The opinion was not unanimous, however, and Justice Ben Overton, joined by Justice Harry Lee Anstead, expressed his concern in a dissenting opinion:

> I dissent because I find that the Alachua County Electric Utility Privilege Fee ordinance imposes the same type of fee as this Court approved as a franchise fee in *City of Pensacola v. Southern Bell Telephone Co.* . . . What concerns me is that we actually have given our local governmental entities more constitutional power, rather than less, since that *Pensacola* decision, which was decided under the 1885 constitutional provisions. Without question, this opinion is now going to be used to challenge every franchise fee agreement in existence. I also believe that many utilities will now refuse to enter into new franchise agreements, and this source of revenue to local governmental entities will in effect be eliminated by this opinion. This opinion may result in a substantial reduction in the revenue that pays for local governmental services.[5]

The Justices' concern regarding the potential for abuse by the investor-owned utilities was both well-placed and prescient. Most of the State's investor-owned electric utilities filed amicus curiae briefs arguing against the validity of the fee.[6] Within a matter of days following the release of the decision, at least one investor-owned utility temporarily ceased renegotiations for franchise re-

3. *Id.*
4. *Id.* at 1066–1067.
5. *Id.* at 1069 (Overton, J., dissenting) (citations omitted).
6. Brs. of Amicus Curiae, *Alachua County v. State*, 737 So. 2d 1065.

newal, modified its model franchise form, and began using the fear of loss of the fees as a means to strip local governments within its service area of significant rights contained in the prior franchises.[7]

On October 28, 2004, however, the Florida Supreme Court issued an opinion in the case of *Florida Power Corp. v. City of Winter Park*,[8] effectively validating a six-percent-of-revenues franchise fee. The decision readdressed questions unanswered by the Court in *Alachua County*, quashed the utility strategy of "take our deal or lose your fees," and restored balance in the sometimes tenuous contractual relationship between owner and user of the public's rights-of-way in Florida.

The purpose of this Article is to examine the fundamental historical basis for municipal franchise fees in Florida. The development of the legal basis for these fees can best be viewed by examining the fee's relationship to another legal concept—the right of "recapture" of property rights through the use of purchase options.[9] It is a relationship, or link, that lay forgotten on the dust heap of history until recent threats to the very existence of the fee led to its rediscovery, judicial re-validation, and enforcement.

Franchise purchase option clauses play a significant role in enabling cities to exercise their powers of franchise. Beginning as early as the 1920s, however, the use (or rather the threat of the use) of these clauses was equated, by a paranoid and competition-

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7. Memo. from Keith Hulbert, Vice-Pres., Fla. Power Co., *Franchise and Municipalization Activities in Florida Power Corporation (FPC) Markets—Situation Assessment* 2 (Aug. 31, 1999) (copy on file with the *Stetson Law Review*). The Vice President responsible for franchise negotiations wrote,

> The [*Alachua*] decision resulted in a brief FPC pullback from negotiations (May through mid-August 1999) to study the Supreme Court's decision. In the meantime, there has been growing concern among cities regarding the potential, utility-driven, collapse of the [six-percent] fee and an industry retreat from negotiating expansive regulatory powers. . . . During the hold on negotiations, FPC developed a new franchise model based on interpretation of the [*Alachua*] ruling and national research. The resulting focus of the model is on the manner of use of the right-of-way. . . . Cities subject to the temporary hold include . . . Winter Park. . . . "

Id.

8. 887 So. 2d 1237 (Fla. 2004) (affirming *Fla. Power Corp. v. City of Winter Park*, 827 So. 2d 322 (Fla. 5th Dist. App. 2002)).

9. The concept of "recapture" derives its roots from the law of salvage. The owner of a vessel wrecked or seized has the right to regain title by "recapturing" the distressed property. *The Star*, 16 U.S. 78, 79 (1818); *Talbot v. Seeman*, 5 U.S. 1, 1 (1801).

fearing industry, with socialism and communism.[10] A major opponent of both the fee and the continued existence of purchase options has been Progress Energy Florida (the utility formerly known as Florida Power Corporation).[11] Recent litigation between

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10. Carl D. Thompson, *Confessions of the Power Trust, A Summary of the Testimony Given in the Hearings of the Federal Trade Commission on Utility Corporations* 584–591 (E.P. Dalton & Co., Inc. 1932); *Get Down to Business!* Winter Park Herald (Winter Park, Fla.) (Mar. 29, 1946). A rather poignant example of the very real impact of this paranoia on power industry participants is found in Florida Power's cross-examination of a Pinellas County Utility Board expert witness during the 1951 Pinellas County Circuit Court proceedings to determine the validity of the Board's proposed reduction of Florida Power's rates:

Q.	Whom did you represent at Montreal?
A.	We represented the Province of Quebec.
Q.	Is it fair to say that approximately ninety-five percent of your firm's work is done on behalf of municipalities and public agencies?
A.	Of the 604 utility investigations and appraisals which we had accomplished as of January 1, 1950, there are 142 retentions other than for public bodies or about twenty-five percent of the work which our firm has done through the years has been for other than public bodies.
Q.	Mr. Matthews, [you do] personally believe in and advocate public ownership of utilities, do you not?
A.	Personally?
MR. HARRIS:	If it pleases the court, I don't believe that is proper cross examination, What the witness believes.
THE COURT:	I think it might tend to show bias or prejudice on the part of the witness. It is proper cross.
A.	I believe that any public body has a right to own a municipal electric plant and to operate it and if and when I have been retained to make studies of the feasibility of such a plant, if I find from an engineering standpoint the plant is feasible I write a report to the city and leave it to them. Now, as to my inclinations toward public ownership, this is beside the point, about as much as the question is beside the point, I think. I am not for the fair deal or the new deal. I have never voted for a Democratic president. Now, that might show my sympathies.
Q.	I don't believe you answered the question though. My question was whether you personally believe in and advocate public ownership of utilities.
A.	I do not advocate public ownership of utilities. I think regulation is the way to keep public ownership of utilities down in this country. If they're properly regulated then we won't have as much public ownership, which in my opinion is on the road to state socialism.

Hrg. Transcr. at 1590–1591 (July 11, 1951) (entering into Public Commission Hearings record the transcript of testimony from *Florida Power Corp. v. Pinellas Utility Board*, 40 So. 2d 350 (Fla. 1949)).

11. The company formerly known as "Florida Power Corporation" changed its name to "Progress Energy Florida" as of January 1, 2003, following the stock merger of Florida

Progress Energy Florida and a number of Florida cities, in which both purchase options and franchise fees were validated by Florida courts, helped debunk a number of myths and misperceptions. Significantly, these appellate decisions have restored a "level playing field" for cities and investor-owned utilities to renegotiate their franchises. Before discussing municipal franchise purchase options in detail, however, it will be helpful to consider the overall legal context in which these options arise—the franchise.

II. FRANCHISES GENERALLY

Franchise law traces its beginning to English law and the royal prerogatives of the Crown.[12] Blackstone defined "franchise" as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject."[13] In his 1911 *Commentaries on the Law of Municipal Corporations*, John F. Dillon defined "franchise" as "a particular privilege which does not belong to the individual or corporation as of right, but is conferred by a sovereign or government upon, and vested in, individuals or a corporation."[14]

Florida courts have followed the traditional definition of franchise. The earliest Florida case is the 1878 Florida Supreme Court decision in *State of Florida ex rel. Attorney General v. Simon Jones*.[15] In that case, the Court ruled that a Pensacola harbor pilot exercised his duties as the holder of a franchise, rather than as an officer of the State.[16] The Court set forth its definition of the nature of a franchise in a 1910 decision: "A franchise is a special privilege conferred upon individuals or corpora-

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Power into Progress Energy. The company has existed since 1899 under a variety of names, including the St. Petersburg Electric Light and Power Company, the Pinellas County Power Company, and then the Florida Power Corporation. The company has also undergone at least four mergers with other utilities—including most recently, Carolina Power & Light. Al Parsons, *Lightning in the Sun: A History of Florida Power Corporation 1899–1974* at 80 (Fla. Power Corp. 1974).

12. Mark N. Halbert, *Municipal Law—Utility Franchise Fees—True Nature of Levy Immaterial When City Possesses Statutory Authority.* City of Little Rock v. AT&T Communications, Inc., *318 Ark. 616 (1994)*, 18 UALR L.J. 259, 263 (1996).

13. William Blackstone, *Commentaries on the Laws of England* vol. II, 37 (9th ed., Garland Publg., Inc. 1978).

14. John F. Dillon, *Commentaries on the Law of Municipal Corporations* vol. III, § 1210, 1905 (5th ed., Little, Brown & Co. 1911) (citing *Bank of Augusta v. Earle*, 38 U.S. 519, 595 (1839)).

15. 16 Fla. 306 (1878).

16. *Id.* at 310–311.

tions by governmental authority to do something that cannot be done of common right [and is] an incorporeal hereditament."[17] This definition was later expanded in a 1940 Florida Supreme Court case:

> [A franchise is] a special privilege conferred by the government upon individuals which does not belong to the citizens of the country as a common right, and when a franchise is accepted, it becomes a contract irrevocable unless the right to [re]voke is expressly reserved and is entitled to the same protection under constitutional guarant[e]es as other property.[18]

The Second District Court of Appeal succinctly defined the nature of a franchise in its 1962 opinion in *West Coast Disposal Service, Inc. v. Smith*.[19] The case involved a complaint for damages and injunctive relief by a private garbage collection company against a trailer park in Sarasota County.[20] The opinion stated,

> The holder of a franchise, in the commercial sense here involved, generally performs functions of a *quasi* governmental nature in that such a franchise is the privilege of engaging under governmental authority in that "which does not belong to the citizens . . . generally by common right." It is a contract with a sovereign authority by which the grantee is licensed to conduct such a business within a particular area and it may prohibit others from engaging in the same business within the prescribed area for a given period of time.
>
> A franchise is fundamentally a property right with respect to its enjoyment and protection, even though the involvement of public interest necessarily subjects it to governmental oversight and control. Injunction will lie in a proper case to prevent the unlawful infringement of a franchise.[21]

Following its solemn recitation of the contractual nature of franchise rights, the Second District went on to rule that the free col-

17. *Leonard v. Baylen St. Wharf Co.*, 52 So. 718, 718–719 (Fla. 1910).
18. *Winter v. Mack*, 194 So. 225, 229 (Fla. 1940).
19. 143 So. 2d 352, 353–354 (Fla. 2d Dist. App. 1962), *cert. denied*, 148 So. 2d 279 (Fla. 1962).
20. *Id.* at 353.
21. *Id.* at 353–354 (citations omitted).

lection of garbage by a trailer park did not impinge upon the exclusive franchise of a garbage collector in Sarasota County.[22]

III. FRANCHISE EXPIRATION

Inherent in the power to create a franchise is the power to terminate it. The general rule is that "[u]pon the expiration of a municipal franchise of a public utility there is no longer any contractual relationship between the municipality and the utility, and the right of the utility under the franchise to use [the municipality's] premises . . . ceases."[23] As recently as 1995, the Kansas Supreme Court held that permitting a utility to continue to operate after franchise expiration "would make the franchise power of the city irrelevant."[24]

Typically, franchise agreements contain a specific term of years that sets the duration of the franchise.[25] Early franchises did not necessarily contain a specific term of years.[26] Several United States Supreme Court decisions, rendered during the early part of the twentieth century, determined that a silent term meant that a franchise was granted in perpetuity.[27] However, the weight of state supreme court authority, even after these United States Supreme Court opinions, appears to be against the proposition that franchises are granted in perpetuity.[28] Courts have reasoned that because special privileges are to be strictly construed, "no franchise which is granted by the State is ever con-

22. *Id.* at 354.

23. 36 Am. Jur. 2d *Franchises from Public Entities* § 54 (2001).

24. *United Tel. Co. of Kan. v. City of Hill City*, 899 P.2d 489, 499 (Kan. 1995).

25. *See e.g. Sarasota County v. Taylor Woodrow Homes Ltd.*, 652 So. 2d 1247, 1250 (Fla. 2d Dist. App. 1995) (twenty-year agreement); *Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1176 (Fla. 5th Dist. App. 2001) (thirty-year franchise agreement); *City of Oviedo v. Alafaya Utils., Inc.*, 704 So. 2d 206, 207 (Fla. 5th Dist. App. 1998) (proposed one-year agreement).

26. Early United States Supreme Court cases examined franchise agreements that were silent as to their duration. For example, the Court in *City of Covington v. Covington & Cincinnati St. Ry. Co.*, 246 U.S. 413, 417 (1918), the Court stated that "there [was] no hint at any limitation of time in the [franchise] grant."

27. *City of Covington*, 246 U.S. at 416; *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 116–117 (1913); *City of Owensboro v. Cumberland Tel. & Telegraph Co.*, 230 U.S. 58, 65 (1913); *City of Louisville v. Cumberland Tel. & Telegraph Co.*, 224 U.S. 649, 663–664 (1912).

28. *State ex rel. Buford v. Pinellas County Power Co.*, 100 So. 504, 508 (Fla. 1924); 36 Am. Jur. 2d *Franchises from Public Entities* § 44 (2001); 27 Fla. Jur. 2d *Franchises from Government* § 12 (2001).

strued to be [perpetual], whether it be in the nature of a contract or not, unless it be so declared in clear terms, or be necessarily implied."[29]

Florida law clearly provides that franchises are not perpetual. Since 1899, the Florida Legislature set a thirty-year limitation on franchise terms.[30] Furthermore, rules of construction provide that franchise grants are construed against the grantee and in favor of the public.[31] Because franchises are held in trust by the government for its people, franchises are not considered renewable unless the franchise clearly provides such, and franchises have been held not to become the absolute property of anyone.[32]

Because franchises are typically not perpetual (or, for that matter, exclusive) in Florida, one must ultimately determine what

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29. *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 1885 WL 353 at *5 (Ala. Dec. 1, 1885).

30. 1899 Fla. Laws ch. 4859; 1906 Fla. Gen. Stat. § 1016; 1920 Rev. Gen. Stat. § 1844; 1927 Fla. Gen. Law § 2954. The Florida Legislature repealed Chapter 167 in 1973. Nevertheless, the "repealing" statute left Florida municipalities with the same powers previously conferred by pre-home rule statutes:

> 166.042 Legislative Intent—
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> (1) It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of chapters 167, 168, 169, 172, 174, 176, 178, 181, 183, and 184 of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. *It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.*

Fla. Stat. § 166.042 (1973) (emphasis added). Thus, the "repeal" had no effect on either the term limit or the franchise purchase option; rather, the statute confirms that Florida cities now have the discretion to set such limits and to impose such conditions. *See Rolle v. City of Miami*, 408 So. 2d 642 (Fla. 1st Dist. App. 1981) (prohibiting a restriction on the power of a city to grant franchises).

31. *Piedmont Power & Light Co. v. Town of Graham*, 253 U.S. 193, 194 (1920); *Delta & Pine Land Co. v. Peoples Gin Co.*, 546 F. Supp. 939, 943 (N.D. Miss. 1982), *aff'd*, 694 F.2d 1012 (5th Cir. 1983); *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 928 (Fla. 1983) (citing *Tampa & J. Ry. Co. v. Catts*, 85 So. 364, 366 (Fla. 1920)).

32. *Cleveland v. Cleveland Elec. Ry. Co.*, 201 U.S. 529, 542 (1906); *Blair v. City of Chi.*, 201 U.S. 400, 457 (1906); *Roney Inv. Co. v. City of Miami Beach*, 174 So. 26, 29 (Fla. 1937); *Leonard*, 52 So. at 718; *Capital City Light & Fuel Co. v. City of Tallahassee*, 28 So. 810, 815 (Fla. 1900); *Fla. C. & Peninsula R.R. Co. v. Ocala St. & Suburban R.R. Co.*, 22 So. 692, 696 (Fla. 1897); *State ex rel. City of Jacksonville v. Jacksonville St. Ry. Co.*, 10 So. 590, 596 (Fla. 1892).

happens upon the expiration or termination of the franchise. Most franchises are renewed or extended by the franchisor and the franchisee.[33] However, case law indicates at least three options exist for the franchising authority: (1) renewal of the franchise; (2) acquisition of the facilities and property used under the franchise; or (3) ouster of the facilities of the expired franchise holder.[34] For half a century, this area engendered significant litigation through the United States.[35] In Florida, the primary means of ouster came to be the municipal franchise purchase option.[36]

IV. ORIGINS OF THE PURCHASE OPTION IN THE UNITED STATES

Purchase options arose to protect the public from the abuses of monopoly. In one of the earliest treatises of its kind, Frank Parsons, a Boston attorney, wrote,

> A monopoly controlled in private interest is sovereign power in private hands. Only the sovereign people have a right to monopoly, for only the people have a right to the sovereignty involved in monopoly, and only public ownership can transform the monopolistic power of taxation into a power of taxation with representation and for public purposes, instead of taxation without representation and for private purposes.
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> Not only do the monopolists exercise the power of taxation without representation; they also in large degree determine the distribution of wealth, decide which industry, which class, which individual, which community shall prosper and which shall not[.]
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33. Joseph Van Eaton, *Old Franchises Never Die? Denying Renewal under the First Amendment and the Cable Act*, 6 Cardozo Arts & Ent. L.J. 37, 37 (1987).

34. *Cajun & Grill of Am., Inc. v. Jet Intern Cuisine, Inc.*, 646 So. 2d 801, 801 (Fla. 3d Dist. App. 1994) (stating that the franchise attempted to avoid ouster); *Stedman v. City of Berlin*, 73 N.W. 57, 58 (Wis. 1897) (upholding a franchise agreement that contained an option to purchase); *see* Van Eaton, *supra* n. 33, at 37 (establishing that franchises can renew their agreements).

35. *See e.g. Cajun*, 646 So. 2d at 801; *Stedman*, 73 N.W. at 57.

36. *See infra* sec. V.

> Public ownership of water, gas, electric light, transit, telegraph and telephone systems, etc., is simply ownership by a large body of citizens instead of ownership by a small body, many stockholders in place of few, and equal instead of unequal holdings, whereby the benefits of industry are more evenly diffused, and the conflict of interest between the owners and the public is eliminated by making the owners and the public one and the same. It is democracy and union in place of aristocracy and antagonism.[37]

Commenting thirty years later, "New Dealer" and law school professor Oscar L. Pond wrote,

> The practical justification for municipal ownership of municipal public utilities is the failure sometimes experienced under any other form of regulation and control to secure satisfactory service at a fair uniform rate. Naturally the purpose and the chief motive of the privately owned municipal public utility is to secure the largest possible return on its investment, while the motive of the municipality in furnishing such service by its own plant is not primarily selfish or mercenary beyond the point of making the business self-sustaining; its chief object being rather to furnish efficient comprehensive service to its inhabitants at cost.[38]

Simultaneously, state and federal courts recognized the difference between private and municipal ownership:

> [Private owners] must have profits, and it is to the interest of such parties to make the profits or net income as large as public officials will consent to make it. The people usually get fleeced when the city places its water works in the hands of private parties. Public-spirited men are not at all times free from the undue influence of self-interest. Their disposition to favor the public is not equal to their inclinations to favor themselves. Such are the leanings of human nature, even when engaged in public-spirited projects.[39]

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37. Frank Parsons, *The City for the People* 16 (C.F. Taylor 1900) (uncopyrighted booklet) (copy on file with the *Stetson Law Review*).

38. Oscar L. Pond, *A Treatise on the Law of Public Utilities* vol. III, § 865, 1726 (4th ed., Bobbs-Merrill Co. Publishers 1932).

39. *City of Ogden City v. Bear Lake & River Water-Works & Irrigation Co.*, 52 P. 697,

The earliest reported purchase option case arose seven years after America's Civil War.[40] In 1850, the City of Wheeling, Virginia granted a gas franchise to the Wheeling Gas Company, which began supplying gas in 1851.[41] By the time the franchise expired, Wheeling was part of the State of West Virginia.[42] Against claims that the option and the arbitration award were null and void, the West Virginia Supreme Court upheld both the option and the award despite the fact that the City, through its police department, seized the gas works prior to the arbitration, and despite allegations that the City's non-neutral arbitrator had manufactured evidence.[43]

Several more cases validating franchise purchase options were decided beginning in the 1890s.[44] Franchise purchase options have been uniformly upheld by virtually every court that has considered the issue, including the United States Supreme Court.[45] The reasoning behind these cases is as follows:

> The distinction between municipal and private ownership is supported by the common observation, made by the courts, which is thereby recognized and given the effect of law, that the public interests in public utility plants are so much more secure when controlled by public than by private capital that an agreement of a public or quasi-public corporation to sell to the one may be allowed, in the absence of express statu-

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699 (Utah 1898).

40. *Wheeling Gas Co. v. City of Wheeling*, 1872 WL 2919 (W. Va. July 1872).

41. *Id.* at *2.

42. On April 17, 1861, just days after the initial shots of the Civil War at Fort Sumter, a convention of Virginians voted to secede from the Union. W. Va. Div. of Culture & History, *West Virginia Statehood*, http://www.wvculture.org/hiStory/statehoo.html (accessed Mar. 30, 2006). On October 24, 1861, however, the counties that now comprise West Virginia held an election and overwhelmingly, by a margin of 18,408 to 781, voted in favor of statehood. At the time, some, including Senator Davis of Kentucky, objected to the formation of West Virginia and to seating West Virginia's representatives in Congress. Even President Lincoln cast doubt on the legality of West Virginia statehood, but also recognized the expediency of West Virginia in the Civil War effort. To date, Virginia does not recognize the validity of West Virginia's secession. Sheldon Winston, *Statehood for West Virginia: An Illegal Act?* West Virginia History vol. 30:3, 530–534 (Apr. 1969) (available at http://www.wvculture.org/hiStory/journal_wvh/wvh30-1.html).

43. *Wheeling Gas Co.*, 1872 WL at **2–3, 33.

44. *See e.g. Hay v. City of Springfield*, 1896 WL 2480 at *1 (Ill. App. 3d Dist. May 16, 1895) (validating a franchise agreement with an option to purchase); *Stedman*, 73 N.W. at 58 (allowing a franchise with an option to purchase).

45. *Farmer's Loan & Trust Co. v. City of Galesburg*, 133 U.S. 156, 179 (1890).

> tory authority, while the law refuses to permit such an agreement to stand when made with private parties. This must be the chief consideration for upholding the options to purchase such plants, which are now so commonly taken by the municipality when granting franchises. Such a precaution is a very wise one for the city to take, for it provides the opportunity for the municipality at any time to take over such property and control it absolutely for the public benefit. While experience shows that this action is often necessary, the fact that it can be done so summarily acts as an important factor in forcing public consideration into the service rendered by the private concern.[46]

The use of purchase options also received support from an unusual source. Thomas Edison's personal secretary (and CEO of Consolidated Edison), Samuel Insull, addressed the National Electric Light Association (NELA) (the forerunner of the Edison Electric Institute) in 1898.[47] Insull "shocked" the investor-owned electric world by advancing the idea that state commissions should regulate electric utilities. The state commission would fix rates and set service standards, insuring control of a territory for a single company.[48] Insull initially failed to convince his fellow CEOs,[49] but these recommendations were later adopted by the NELA in 1907.[50]

An early legal impediment to municipal purchase of utilities was a lack of clear authority to purchase existing utilities.[51] Shortly after the publication of Pond's study, the Seventh Circuit Court of Appeals issued what became the landmark federal deci-

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46. Pond, *supra* n. 38, at § 869.

47. *See* Richard Rudolph & Scott Ridly, *Power Struggle: The Hundred Year War over Electricity* 38–39 (Harper & Row 1986).

48. *Id.* The thrust of Insull's argument was that the electric industry should pursue state monopoly regulation, rather than free competition, an idea initially rejected by the industry. *Id.*

49. *Id.*

50. Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env. (newsltr. of ABA Sec. Env., Energy & Resources) 54, 55 (2005).

51. Oscar L. Pond, *Municipal Control of Public Utilities: A Study of the Attitude of Our Courts toward an Increase of the Sphere of Municipal Activity* 10 (Columbia U. Press 1906).

sion upholding a municipal gas franchise purchase option in favor of the City of Indianapolis.[52]

During this same period, the number of municipally owned electric light and power companies rose dramatically.[53] Beginning with four municipal electric companies in 1882, municipal ownership reached its peak in 1923, when 3,066 municipal electric utilities operated in the United States.[54] From 1923 to 1927, however, private investor-owned utilities purchased over 1,500 municipal utilities.[55] Over sixty percent of the municipalizations that took place during the same time period occurred in the Midwest and south Atlantic states.[56] These same areas accounted for over fifty percent of all sales of municipal systems to private owners.[57]

During this same period, the federal government developed what became known as a right of "recapture." Originally, the law of recapture related to maritime salvage.[58] For example, the recapture of a vessel from pirates or from an enemy is a service for which salvage will be awarded, if the recapture is lawful and a meritorious service has been rendered.[59] Utilizing this salvage terminology, Congress adopted the Federal Water Power Act of 1920.[60] This law firmly established "the principle of federal regulation of water power projects, limit[ing] licenses to not more than fifty years, and provid[ing] for Government recapture of the power at the end of the franchise."[61] By the 1930s and 1940s, law review commentators referred to purchase options as "recapture clauses."[62] The private investor-owned electric utilities also began

52. *City of Indianapolis v. Consumers' Gas Trust Co.*, 144 F. 640, 644–647 (7th Cir. 1906), *cert. denied*, *Cole v. City of Indianapolis*, 203 U.S. 592 (1906).

53. Herbert B. Dorau, *The Changing Character and Extent of Municipal Ownership in the Electric Light and Power Industry* 11–12 (Inst. for Research & Land Econs. & Pub. Utils. 1930).

54. *Id.*

55. *Id.* at 18 tbl. 6.

56. *Id.* at 30 tbl. 10.

57. *Id.* at 37 tbl. 14.

58. *Fine v. Rockwood*, 895 F. Supp. 306, 308 (S.D. Fla. 1995).

59. *Id.* at 310.

60. Gifford Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9, 19 (1945).

61. *Id.*

62. Richard Joyce Smith, *Uncontrolled Expansion in the Light and Power Industry*, 42 Yale L.J. 1153, 1160 (June 1933).

using the term "recapture clause" interchangeably with "purchase options" in Florida.[63]

From the end of the nineteenth and continuing into the twentieth century, at least twenty-three states adopted or authorized some form of franchise purchase option law.[64] Out of forty-plus known cases, all unanimously upheld the purchase option against a variety of attacks on its validity.[65] The earliest validation of a purchase option occurred in 1872;[66] since 2001, no less than six purchase options have been upheld in a variety of state trial and appellate courts.[67] Five of those cases were determined in Florida.[68]

V. DEVELOPMENT OF PURCHASE OPTIONS IN FLORIDA

Prior to the creation of constitutional "home rule" in the 1968 Constitution[69] and the legislative creation of municipal "home rule" in 1973,[70] the Florida Legislature exercised more direct control over cities. During the mid-1890s, the City of St. Augustine became embroiled in a considerable controversy when it attempted to start an electric-street-car line in the City. The conflict started when the City competed with Henry Flagler, who wished

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63. Fla. Power Co., *Franchise Municipalization* 26 (May 10, 1994) (unpublished internal rpt.) (copy on file with the *Stetson Law Review*) [hereinafter *May 1994 Study*]; Fla. Power Co., *Municipalization Study: Interim Presentation to Municipalization Study Team* 17 (Mar. 30, 1994) (unpublished internal rpt.) (copy on file with the *Stetson Law Review*) [hereinafter *March 1994 Study*]; Fla. Power Co., *City of St. Petersburg, Florida: Franchise History* 5 (Apr. 26, 1967) (copy on file with the *Stetson Law Review*).

64. Eugene McQuillan, *The Law of Municipal Corporations* vol. 12, §§ 35.18–35.23, 513–525 (3d ed., Clark Boardman Callaghan 1995). These states included Alabama, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, North Carolina, Oregon, Rhode Island, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

65. *Id.*

66. *See supra* nn. 40–44 and accompanying text (discussing the City of Wheeling's 1872 struggle with purchase options).

67. *E.g. Grover v. Jacksonville Golfair, Inc.*, 914 So. 2d 995, 996–997 (Fla. 1st Dist. App. 2005); *Kelly v. Burnsed*, 805 So. 2d 1101, 1106 (Fla. 1st Dist. App. 2002); *Mr. Sign Studios, Inc. v. Miguel*, 877 So. 2d 47, 49–50 (Fla. 4th Dist. App. 2004); *Costello v. The Curtis Bldg. Partn.*, 864 So. 2d 1241, 1242–1245 (Fla. 5th Dist. App. 2004); *City of Casselberry*, 793 So. 2d at 1176–1179; *Ill.-Am. Water Co. v. City of Peoria*, 774 N.E.2d 383, 391–392 (Ill. App. 3d Dist. 2002).

68. *Grover*, 914 So. 2d 995; *Kelly*, 805 So. 2d 1101; *Mr. Sign Studios*, 877 So. 2d 47; *Costello*, 864 So. 2d 1241; *City of Casselberry*, 793 So. 2d 1174.

69. Fla. Const. art. XIII, §§ 9–11, 24.

70. 1973 Fla. Laws ch. 129.

to create his own transportation system.[71] Flagler attempted to stop the building of an electric railway in the City.[72]

In 1889, Flagler deeded a right-of-way to the City for the widening of certain streets.[73] The deed required, however, that the City had to obtain Flagler's permission for the construction of transportation or communication facilities on the property.[74] The City managed to find a loophole to obtain the necessary right-of-way to construct an electric railway, but it remained plagued with construction problems.[75] The City granted a franchise to certain investors for the railway, but placed a term of ninety-nine years on the franchise.[76] When the investors were unable to raise the funds for construction, the City was temporarily left without any means of building the railway.[77] Later that same year, the mayor refused to approve an electric light franchise ordinance because it contained the same problems as the electric railway franchise ordinance:

> I return herewith the ordinance granting a franchise to T.J. Appleyard, Geo[rge] H. Packwood and E.M. Hammond, their associates or assigns, to construct, maintain and operate an Electric Lightening Plant, etc. passed by your Honorable body August 14, 1895, without my approval, for the following reasons:
>
> 1st: This is a valuable franchise given for nothing, its future value may and probably will be great.
>
> The City of New Orleans has just adopted a great scheme for sanitary improvements, including both drainage and sewerage to cost $7,000,000 all of which will be paid from the fund derived from the sale of corporate franchises to railroads, light companies and others by the city.

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71. Edward N. Atkin, *Flagler: Rockefeller Partner and Florida Baron* 129 (U. Press Fla. 1991).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Ltr. from Henry Gaillard, Mayor, City of St. Augustine, to City Council of City of St. Augustine, *Refusal to Approve Franchise Grant for Electric Light Ordinance* 1 (Aug. 17, 1895) (copy on file with the *Stetson Law Review*).

77. *Id.*

> The franchise for lighting the city is the last franchise the city possesses, having given away both the water and street railway franchises.
>
> While the [s]treet railroad ordinance granting a franchise to Messrs. Appleyard and others did not commend itself to my judgment, as a wise measure, I did not interpose a veto because there seemed a strong public sentiment in its favor.
>
> 2nd: [The] [g]rant is for too long a time. The City is now experiencing great detriment from its contract obligations and to grant a franchise which must in its nature be exclusive for 99 years, there should be the strongest reasons.
>
> 3d: The ordinance fails to properly provide for supervision and protection of persons and property. It is absolutely without any restrictions, except that the erection of poles shall be done under the supervision of the City Council. Electricity is a new force, but little understood, [so] we do know its power for destruction. To grant an unrestricted right to use this force in any quantity, and any manner, to a corporation for 99 years, I must be convinced that the citizens will derive a greater advantage than I can see in the matter of lighting.
>
> 4th: I object to the granting of franchises to parties not known to possess financial ability to carry out the purposes of the grant.[78]

Four years later, a freshman representative from St. Augustine, William MacWilliams, introduced the bill that was later codified as Section 167.22 of the Florida Statutes.[79] A former city attorney for St. Augustine, MacWilliams successfully saw the law through the Legislature.[80]

The statute limited franchises to a term of no longer than thirty years.[81] The law applied to "any franchise or right to use any street for the purpose of operating along or across the same any street railroad, water works, telephone, gas or electric business or other business requiring the use of mains, pipes, or wires

78. *Id.*
79. 1899 Florida Laws ch. 4859.
80. *Id.*
81. *Id.*

in any street."[82] The statute required purchase options and left it up to the cities whether to buy all or some of the facilities utilized in the franchises.[83] The statute provided that valuation would take place pursuant to arbitration.[84] Finally, and most importantly, the statute provided that a franchise without the term limit or the purchase option would be void.[85]

The earliest known exercise of a purchase option in Florida occurred in the City of Orlando, which granted water and electric franchises to the Orlando Water and Light Company on May 18, 1901.[86] Over the next ten years, the City became dissatisfied with the quality of the light given off by the streetlights. In September 1911, Orlando hired an outside attorney from Tampa who rendered an opinion that the existing franchise of the Orlando Water and Light Company was void because it lacked a purchase option.[87] Over the next year, a new franchise was renegotiated that included the purchase option clause.

Approximately eight years later, the general manager of the Orlando Water and Light Company, D.A. Cheney, appeared before the city commission to inform it that he no longer desired to make the amount of investment necessary to extend the electric system to address Orlando's rapid growth.[88] The City Minutes contain the "negotiations" between Mayor Duckworth and Cheney:

> Cheney: I just came up to find out what was expected of us as I wanted to get things straightened out before I left.

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82. *Id.*

83. *Id.*

84. *Id.*

85. Franchises entered into prior to the adoption of Section 167.22 were validated even though their terms exceeded thirty years. *See City of St. Petersburg v. Pinellas County Power Co.*, 100 So. 509 (Fla. 1924); *State ex rel. Buford*, 100 So. 504.

86. Orlando Utils. Commn., *A History of OUC—The Reliable One*, http://www.ouc.com/about/history.htm (accessed Jan. 29, 2006).

87. Ltr. from Robert Davis, Atty., to City Commn. City of Orlando, *Opinion Letter Regarding Existing Electric Franchise* 1 (Sept. 21, 1911) (copy on file with the *Stetson Law Review*).

88. City Commn. City of Orlando, *Meeting Minutes* (Mar. 6, 1920) (copy on file with the *Stetson Law Review*).

Duckworth: It is up to the Orlando Water & Light Co. as I see it in regard to whether they have made their price and want to submit same.

Cheney: We are prepared to submit replies and price.

Duckworth: We are in receptive mood.

Cheney: As I told you the other day, . . . the market on some of the items has slumped, and in our revised report, we are bringing the price in line as far as we can.

Duckworth: There is nothing much we can do this morning unless you have those prices with you.

• • •

Cheney: There is nothing to do but file revised price? No chance for us to make any other kind of proposition?

Duckworth: The proposition is this as I see it. You own the water and light plants. It is up to you to put a price on it if you will sell it to the public, and it is up to us to submit it to the people.

Cheney: Then you cannot take any action on it yourselves.

Duckworth: I don't see how we can.[89]

Orlando and the utility proceeded to arbitration. Contemporaneous newspaper accounts refer to a "board of appraisers" selected by the City of Orlando and the Orlando Water and Light Company.[90] Orlando valued the plants at $490,000, while the util-

89. Orlando Pub. Utils. Comm., *Meeting Report* (June 7, 1921). Cheney was seeking council support to finance the expansion of his father's utility. Duckworth took the position that if Cheney did not want to finance the expansion of the utility, then a purchase price would have to be determined by arbitration and the purchase validated by a referendum of registered Orlando voters. And that is precisely what transpired.

90. *Appraisers Value Water and Light Plants, $607,514*, Orlando Morn. Sentinel 1 (Dec. 13, 1921) (copy on file with the *Stetson Law Review*).

ity requested $1,035,000.[91] The three appraisers came back with a "baby split" decision of $607,514 on December 12, 1921.[92]

Following the one-day arbitration, a referendum was held on February 21, 1922.[93] This referendum was required by an 1897 Florida statute that mandated referenda prior to a city's buying or selling electric or gas plants.[94] This statute was later codified as Chapter 172 of the Florida Statutes and was repealed by the Municipal Home Rule Powers Act.[95] By a vote of 462 to 161, Orlando voters elected to purchase the water and electric system.[96] The transaction closed in the summer of 1922. During the 1923 legislative session, the Orlando Utilities Commission (OUC) was created to operate and improve the water and electric system.[97] Today, OUC is the second largest municipal electric utility in Florida.[98]

From 1923 until 1989, there were no documented cases involving the exercise of a franchise purchase option in Florida. Indeed, in 1973, the Florida Legislature repealed Chapter 167 and the mandatory purchase option law as a part of the Municipal Home Rule Powers Act. This does not mean, however, that purchase options lost their meaning. The majority of franchises renewed during this period still retained purchase options.[99]

VI. THE GENERAL DEVELOPMENT UTILITIES ARBITRATIONS

Until the 1980s, the franchise purchase option was most closely linked to electric utilities. In the late 1980s, federal criminal investigations and indictments contributed to the bankruptcy

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91. *Id.*

92. *Id.*; Orlando City Council, *Minutes of Special Meeting* (Dec. 12, 1921).

93. *Official Vote on Bonds Announced*, Orlando Morn. Sentinel 1 (Feb. 23, 1922) (copy on file with the *Stetson Law Review*).

94. 1897 Florida Laws ch. 4600.

95. Fla. Stat. § 172 (repealed by Fla. Stat. § 166.042 (1973)).

96. *Official Vote on Bonds Announced*, *supra* n. 93 at 1.

97. Orlando Utils. Commn., *supra* n. 86.

98. Orlando Utils. Commn., *All about OUC—The Reliable One*, http://www.ouc.com/about/default.htm (accessed Feb. 23, 2006).

99. A review of all 104 franchises that existed in 1972 between Florida Power Corporation and the cities reveals that *all* of the franchises still contained the purchase option. Florida investor-owned electric utilities did not start deleting purchase options until the late 1970s.

filing of the General Development Corporation (GDC).[100] To fund the bankruptcy plan of reorganization, GDC was forced to liquidate its utility assets held by wholly owned subsidiary General Development Utilities (GDU).[101] While GDC was successful in provoking several "quick take" eminent domain proceedings, two cities—the City of Palm Bay and the City of North Port—brought actions to enforce franchise purchase options granted in 1959 and 1961, respectively.[102]

In those cases, two different circuit courts upheld franchise purchase options pursuant to Section 167.22.[103] In the *Palm Bay* case, Palm Bay had previously granted a water and sewer franchise containing a franchise purchase option to GDU in 1959.[104] Interestingly, the City instituted eminent domain proceedings in 1965 to condemn the system when GDU refused to extend service.[105] Palm Bay won the battle and lost the war. The Fourth District Court of Appeal ruled that Palm Bay had the power to condemn the water and sewer system.[106] However, following the remand to the circuit court, GDU argued that condemnation was inappropriate because Palm Bay had granted GDU a valid franchise for thirty years upon which GDU relied.[107] The City ran out of money to prosecute the lawsuit[108] and stipulated to an order of dismissal without prejudice on April 17, 1968.[109]

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100. The parent company, General Development Utilities (GDC), and a number of its executives were found guilty of federal mail fraud charges. Though the convictions were later reversed by the Eleventh Circuit Court of Appeals, the bad publicity surrounding GDC's business practices in selling lots effectively doomed the company. *In re Gen. Dev. Corp.*, 169 B.R. 756 (Bankr. S.D. Fla. 1994).

101. *Utility Prices Are Unresolved for Developer: GDC Eyes $153 Millions for 8 Systems*, Sarasota HeraldTrib. 1 (Apr. 6, 1992).

102. *City of North Port v. Gen. Dev. Utils., Inc.*, No. 90-5871 (Fla. 12th Cir. Mar. 19, 1991); *City of Palm Bay v. Gen. Dev. Utils., Inc.* (*Palm Bay II*), No. 89-12576-CA-T (Fla. 18th Cir. Oct. 3, 1989), *aff'd*, *Gen. Dev. Utils., Inc. v. City of Palm Bay*, 573 So. 2d 848 (Fla. 5th Dist. App. 1990) (per curiam) *aff'd*, *Gen. Dev. Utils., Inc. v. City of Palm Bay*, 583 So. 2d 1041 (Fla. 5th Dist. App. 1991) (per curiam).

103. *Id.*

104. Palm Bay, Fla., Ord. 31 (Oct. 8, 1959) (copy on file with the *Stetson Law Review*).

105. Palm Bay, Fla., Res. 65-34 (Dec. 16, 1965) (copy on file with the *Stetson Law Review*).

106. *City of Palm Bay v. Gen. Dev. Utils., Inc.* (*Palm Bay I*), 201 So. 2d 912, 916–917 (Fla. 4th Dist. App. 1967). Interestingly, GDU argued the validity of the franchise in the Circuit Court as grounds to dismiss the eminent domain case. Pl.'s Compl., *Palm Bay I*, No. 34434 (Fla. 18th Cir. June 20, 1966).

107. Def.'s Ans. on Remand at 3, *Palm Bay I*, No. 34434 (Fla. 18th Cir. Mar. 21, 1968).

108. Tr. Transcr., Dir. Test. Hal Schmidt at 171, *Palm Bay II*, No. 89-12576-CA-T (copy

Approximately twenty years later, as the franchise was nearing the expiration of its term, Palm Bay sought to negotiate to renew the franchise or purchase the system.[110] GDU refused to enter into a new franchise that would include a purchase option clause.[111] Palm Bay filed suit in August of 1989, and two months later the Brevard County Circuit Court entered an order compelling arbitration and rejecting the twenty-six separate arguments raised by the law firms representing GDU.[112] Arbitration proceedings were held in the City of Orlando in May and June of 1992.[113] The parties' positions on valuation varied significantly, and ultimately, the arbitration panel determined the value to be $31.9 million on June 13, 1992.[114]

A companion case was litigated in Sarasota County involving the City of North Port, Florida. Another GDC community, the City of North Port sought enforcement of its rights in September 1990.[115] After weathering substantially similar arguments from GDU, North Port prevailed in March 1991 and received an order compelling arbitration.[116] That arbitration was completed on April 28, 1992.[117] Again, the parties' valuations differed significantly, but the three-member arbitration panel brought back a valuation of $16.5 million, much closer to North Port's valuation than that of GDU.[118]

Attorneys for GDU advanced a number of arguments in an effort to invalidate the options in question, including the novel argument that the options had been preempted by the Florida Leg-

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on file with the *Stetson Law Review*).

109. Or. Dismissal & Stip., *Palm Bay I*, No. 34434 (ordered Apr. 17, 1968) (copy on file with the *Stetson Law Review*).

110. *Palm Bay II*, No. 89-12576-CA-T.

111. *See generally* Or. Granting Pl.'s Mot. Compelling Arb., *Palm Bay II*, No. 89-12576-CA-T (Fla. 18th Cir. Oct. 3, 1989) (granting Palm Bay's request for arbitration after GDU disputed the validity of the franchise) (copy on file with the *Stetson Law Review*).

112. *Id.*

113. Arb. Award, *Palm Bay II*, No. 89-12576-CA-T (Fla. 18th Cir. June 13, 1992) (copy on file with the *Stetson Law Review*).

114. *Id.*

115. *City of North Port*, No. 90-5871.

116. Or. Granting Pl.'s Mot. Compel. Arb., *City of North Port*, No. 90-5871 (Fla. 12th Cir. Mar. 19, 1992) (copy on file with the *Stetson Law Review*).

117. *Id.*; Arb. Award, *City of North Port*, No. 90-5871 (Fla. 12th Cir. Apr. 28, 1992) (copy on file with the *Stetson Law Review*).

118. *Id.*

islature when that body adopted Section 367.011(4) of the Florida Statutes in 1971, which provides,

> (4) This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits.[119]

Arguing the case of *County of Lee v. Lehigh Utilities, Inc.*,[120] GDU reasoned that when the Legislature awarded exclusive authority over water and wastewater utilities rates, authority, and service to the Florida Public Service Commission (FPSC), the franchise was void. North Port and Palm Bay successfully responded that, (1) unlike Lee County, neither of the two cities had voluntarily surrendered the authority to regulate its rights-of-way to the FPSC, (2) cities were (and remained) exempt from FPSC jurisdiction, and (3) the Legislature had not granted any authority to the FPSC to veto any condemnations or purchases of water and wastewater systems by municipalities.[121] Every court faced with this preemption argument against the validity of the franchises with GDU rejected the argument. The same courts also rejected the argument that the repeal of Section 167.22 by the Municipal Home Rule Powers Act of 1973 terminated the franchises.[122]

Thus, by the last decade of the twentieth century, franchise purchase options retained their validity despite the 1973 repeal of the 1899 law. At least one company was concerned enough to mount efforts to modify state law to preempt recapture clauses.[123]

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119. Fla. Stat. § 367.011 (1971); *see also* Or. Granting Pl.'s Mot. Compel Arb. at 4, *City of North Port*, No. 90-5871 (responding to GDU's argument that Florida Statute Section 367.011 preempted the City's option).

120. 307 So. 2d 496 (Fla. 2d Dist. App. 1975). Interestingly, this case involves the issue of what entity could regulate investor-owned water utilities, as well as the continued viability of Lee County's franchise fees. *See also FPSC v. Fla. Cities Water Co.*, 446 So. 2d 1111 (Fla. 2d Dist. App. 1984).

121. *See* Or. Granting Pl.'s Mot. Compel Arb., *City of North Port,* No. 90-5871 (rejecting GDU's arguments and finding for North Port); Or. Granting Pl.'s Mot. Compel Arb., *Palm Bay II*, No. 89-12576-CA-T (rejecting GDU's arguments and finding for Palm Bay); *cf.* Fla. Stat. § 367.071(1) (granting express authority to the FPSC to review transfers of systems to and from utilities, while limiting the FPSC by providing that transfers to governments are to be granted "of right").

122. Fla. Stat. § 166.042.

123. The attempt failed on several occasions. *March 1994 Study*, *supra* n. 63, at 16;

The company was Florida Power Corporation. Indeed, the company's history of dealing with the recapture/purchase option provides the clearest picture of the historical relationship between the purchase option and franchise fees.

VII. THE HISTORICAL RELATIONSHIP BETWEEN PURCHASE OPTIONS AND FRANCHISE FEES

In Florida, purchase options have a direct relationship to the establishment of franchise fees, which were created to prevent the exercise of the options. In return for longer franchises, Florida Power increased the value of the fee.

For years, Florida's largest investor-owned electric utilities expended considerable effort to prevent the growth of municipal competition. Since some of these activities triggered federal and state investigations, as well as significant litigation, a substantial record of these events remains.[124] The best documented example of these activities involves Progress Energy Florida, the utility then known as "Florida Power Corporation."

In many respects, Florida Power's story mirrors that of many investor-owned electric utilities in the United States. In 1927, Samuel Insull gained control of Florida Power by acquiring its stock through the now-infamous Middle West Utilities Holding Corporation.[125] In a manner eerily reminiscent of Enron, Insull and Middle West issued stock based on the undepreciated and oftentimes overvalued reproduction costs of a company's assets.[126] This "stock watering" was multiplied up a chain of dozens of corporations, the stock value of which was based upon an ever-increasing, fictionalized asset value.[127] Indeed, the Federal Trade

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May 1994 Study, *supra* n. 63, at 23.

124. *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973); *Gainesville Utils. Dept. v. Fla. Power Corp.*, 402 U.S. 515 (1971); *City of Gainesville v. Fla. Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978); *U.S. v. Fla. Power Corp. & Tampa Elec. Co.*, 1971 U.S. Dist. LEXIS 11973 (M.D. Fla. Aug. 19, 1971).

125. Marion L. Ramsay, *Pyramids of Power: The Story of Roosevelt, Insull and the Utility Wars* 245 (Bobbs-Merrill Co. 1937). Ramsay was the Washington reporter on electric utilities beat for the *Baltimore Sun*. Middle West was once described by its own corporate historian as having been "a 'tramp company,' a kind of lady who went from the arms of one holding company to another, a gal who was often exploited and abused and generally manipulated." Parsons, *supra* n. 11, at 80.

126. Ramsay, *supra* n. 125, at 214.

127. *Id.*

Commission concluded the stock write up to have been almost one-and-a-half billion dollars.[128]

Insull initially staved off bankruptcy following the stock market crash of 1929.[129] However, by June of 1932, the Middle West Utilities Company, controlling 239 other utilities, 24 subholding companies, and 13 other miscellaneous subsidiaries, declared bankruptcy with a loss estimated at half a billion dollars.[130] Three months later, in a radio campaign address delivered at Portland, Oregon, presidential candidate and then New York Governor, Franklin D. Roosevelt, delivered what has become the classic statement of policy support for municipal franchise purchase options:

> I therefore lay down the following principle: That where a community—a city or county or a district—is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service. That right has been recognized in a good many of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates. It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" gets beyond the point where a mere scolding does no good.[131]

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128. *Id.* at 212.
129. *Id.* at 155.
130. *Id.* at 224.
131. Franklin D. Roosevelt, Speech, *A Campaign Address on Public Utilities and Development of Hydro-Electric Power* (Portland, Or., Sept. 21, 1932) (available at http://newdeal.feri.org/speeches/1932a.htm).

Until the end of World War II, the national electric industry in general, and Florida electric companies in particular, went through a period of retrenchment and reorganization. Based upon the Insull scandals of the 1920s and 1930s, Congress adopted the Public Utilities Holding Company Act of 1935, which had the effect of outlawing "stock watering" and the creation of the corporate structure that had led to the financial disaster of 1932.[132] Authority to reorganize and reduce the rate bases of these utilities fell to the United States Securities and Exchange Commission (SEC) and the newly created Federal Power Commission. The 1935 Act required all holding companies to register with the SEC and to limit their operations to a single integrated system.[133] During this period, the last two electric municipal purchases in Florida took place in Key West (1942) and Green Cove Springs (1943), where the cities bought out debt-ridden small electric systems. At the same time, however, three companies were merged into a new Florida Power Corporation, effective January 14, 1944. Once the war ended, Florida Power was in a position to comply with the federal securities laws and began expansion for what would prove to be unprecedented service area growth.

Shortly after World War II, four cities investigated municipal acquisition pursuant to franchise purchase options, including Apopka, Clearwater, DeLand, and Winter Park.[134] To block municipalization, Florida Power began a policy of paying franchise fees to cities as they renewed the franchises within its Florida service area.[135] Interestingly, Clearwater and Winter Park both held referenda, in which municipal acquisition proponents were soundly thrashed.[136] The precise corporate strategy of using fran-

132. 15 U.S.C. § 79 (2000); *see also* James W. Moeller, *Electric Utilities and Telecommunications*, 16 Energy L.J. 95, 115 n. 183, 115–121 (1995) (outlining the purpose and effects of the Act).

133. 15 U.S.C. § 79.

134. *See* William Snow, *Outline of History of Florida Power Corporation's Franchise Tax Development and Application, 1944–1962*, at 2–3 (Mar. 5, 1962) (unpublished internal report) (identifying these cities as the first to receive franchise tax rewards for renewing their franchises) (copy on file with the *Stetson Law Review*).

135. *Id.* at 1.

136. Out of 1,192 qualified votes, 1,068 voted against purchasing the electric distribution system and 124 voted in favor during the January 14, 1947 Winter Park referendum. *Clearwater Votes Seven to One against Owning Electric Utility*, Winter Park Herald (Winter Park, Fla.) 1 (Apr. 12, 1946); *Nearly 1200 Register Their Preference in Tuesday's Special Municipal Election*, Winter Park Herald (Winter Park, Fla.) 1 (Jan. 1, 1947).

chise fees to block these and other municipalizations was only later revealed as a part of an internal report.[137]

According to the report, Florida Power put into effect a policy in 1944 "under which all new franchises granted to the Company would provide for a franchise tax payment to the municipality as part of the consideration for the benefits received . . . under the franchise grant."[138] The amount of the franchise "tax" was established as two percent of the gross revenue received from the sale of electric energy within the municipality's corporate limits.[139] The "tax" was payable semi-annually, on June 30 and December 31.[140]

According to the report,

> [Florida Power] felt it necessary and desirable to pay a franchise tax upon obtaining new franchises or renewals of expiring franchises. This practice was beginning to be adopted by other utility companies to provide the municipalities with a sorely needed new source of revenue, to compensate them for the use of their streets and rights-of-way by electric utility pole lines, personnel and equipment, for providing an incentive for granting a new long-term franchise (or renewal) and as a consideration for the municipality agreeing in the franchise to refrain from distributing or selling electricity in competition with the Company during the life of the franchise.[141]

The report's author was of the opinion that Florida Power's decision to pay a franchise tax was "a wise and sound one" because only the City of Winter Garden was withholding the requested franchise renewal, whereas eighty-nine other municipalities had granted Florida Power new or renewed franchises since 1944, when the franchise tax policy was adopted.[142]

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137. This report was produced to preserve the history of the company's franchise dispute with the City of St. Petersburg. Included in the report is a smaller document, which contained a detailed description of the company's franchise policy. The "Outline's" author, William Snow, was Florida Power's employee in charge of "Governmental Relations," the department responsible for dealings with local governments. *See* Snow, *supra* n. 134 (explaining the history of the Company's franchise policy).

138. *Id.* at 1.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* From 1944 to 1947, the Company granted thirteen franchises that paid fran-

Seven years after it began paying franchise fees to the cities, Florida Power found itself embroiled in a rate dispute in Pinellas County that ultimately resulted in the Legislature's delegating the authority to oversee electric rates to the Florida Railroad and Public Utilities Commission (FRPUC).[143] The Pinellas County Utility Board ordered Florida Power to refund a million dollars for its operations in Pinellas County. In an attempt to avoid paying that refund, Florida Power supported the adoption of the so-called Dowda Bill in 1951, which led to the creation of Chapter 366, Florida Statutes.[144] Interestingly, Section 13 of the Dowda Bill expressly provided that the bill would have no effect whatsoever on Section 167.22, the purchase option law.[145]

Within a few months after the law became effective, Florida Power filed a rate case before the FRPUC.[146] The rate case ultimately resulted in the first-ever state-wide rates being set for Florida Power Corporation. Of more interest to municipal practitioners, however, is testimony on record regarding how Florida Power viewed the basis for the franchise fee. In the fall of 1952, Florida Power was required by rule of the FRPUC to file documents related to its operations and operating expenses.[147] As part of that requirement, from 1952 until sometime in 1980, Florida Power filed a copy of every municipal franchise it ever signed.[148] Why did Florida Power file the franchise agreements? The answer lies in the sworn testimony of Florida Power President William J. Clapp:

> Franchise taxes are exacted by municipalities as the price of doing business within the limits of the cities involved.

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chise "taxes" of two percent. The Company also granted franchises to Winter Park, Clearwater, Apopka, and DeLand, with franchise fee provisions that *increased* if a periodic ten-year recapture clause was not exercised. *Id.* at 2.

143. *See* Fla. Pub. Serv. Commn., *Inside the Florida PSC 2006*, http://www.floridapsc.com/general/publications/inside.pdf (accessed Mar. 14, 2006) (identifying that in 1951 the Commission took over control of the state's electric rates).

144. Fla. Stat. § 366 (2005).

145. *Id.*

146. *In re Application of Fla. Power Corp. for Auth. to Adjust Its Rates*, No. 3719-EU (Fla. R.R. & Pub. Utils. Commn. Feb. 10, 1953).

147. Fla. Power Corp.-Basic Doc. File, No. 3654-EU (Fla. Pub. Serv. Commn. Oct. 9, 1952) (noting the documents relating to the Company's operations and expenses).

148. Fla. Power Corp.-Basic Doc. File, No. 3654-EU (Fla. Pub. Serv. Commn. 1952–1984).

> Unless the Company meets the terms of each municipality it must discontinue doing business in that particular area. If that happened the Company would be unable to furnish service at existing rates, just as an isolated operation is always much more expensive than a large integrated operation. In the long run every customer of the Company benefits as a result of the business done by the Company in the numerous municipalities which it serves and this in spite of any franchise tax that the Company may be compelled to pay.[149]

In other words, municipal electric franchise fees were not based on the rental value of the right-of-way, or the cost of regulation; they were based on granting a franchise to operate an electric business within the city limits. This has been borne out by later public statements from other investor-owned utilities in public testimony.[150]

Basing the fee on the right to conduct electric business is not only logical, but defensible. The courts of Florida have held that a city has the inherent power, authority, and prerogative to provide utility service to its residents and preclude competition.[151] Since a municipality has a paramount right to provide utility services to its residents, it also has the right to grant a franchise allowing another entity to serve its residents for a limited time period.[152] Therefore, if a city has exercised its power to franchise the right to provide electric service to its residents, then that same city must also have the corresponding right, upon termination or expiration of that franchise, to end the grant of authority.[153]

On June 17, 1954, Florida Power Corporation's directors reviewed the Company's franchise "tax" policy and adopted a resolution that changed its policy on purchase options.[154] This policy

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149. Transcr. Test. W.J. Clapp vol. 5, 640, *In re Application of Fla. Power Corp.*, No. 3719-EU (Fla. R.R. & Pub. Utils. Commn. Apr. 27, 1953). Unfortunately, this document was not uncovered until *after* the record in the Winter Park appeal was complete.

150. Transcr., Workshop City of Riviera Beach & Fla. Power Corp. at 3:12–16 (Jan. 23, 2003).

151. *Ameristeel Corp. v. Susan Clark*, 691 So. 2d. 473, 478 (Fla. 1997); *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968); *Ellis v. Tampa Water-Works Co.*, 47 So. 358, 360 (Fla. 1908).

152. *Ellis*, 47 So. at 360.

153. *City of Indianapolis*, 144 F. at 644; *City of Fayetteville v. Fayetteville Water, Light & Power Co.*, 135 F. 400, 404 (E.D.N.C. 1905).

154. Snow, *supra* n. 134, at 4.

change was an attempt to eliminate interval recapture clauses, which were quite common at the time. Florida Power took the position that it would accept only straight term franchises (thirty years, except when city charters limited franchises to shorter terms) franchises, without intermediate recapture provisions.[155] Accordingly, all franchises granted in 1956 and subsequently were for thirty-year terms without intermediate recaptures.[156] As of 1962, thirty-seven franchises contained intermediate recapture clauses, fifty-four franchises contained recapture clauses at the date of expiration, and three franchises contained recapture clauses and an expiration periods of ten years.[157] Interestingly, all but three of the ninety-four franchises contained provisions that the city would not distribute and sell electricity in competition with the company.

Shortly after Florida Power's franchise "tax" policy change, however, several central Florida cities investigated exercising their purchase options. These included Eustis (1955), Winter Garden (1958–1962), and Haines City (1966–1968). Perhaps the most interesting case involved Winter Garden. The City, determined to build its own generating plant, held a referendum, and initially voted to issue revenue bonds to fund the construction of the generation plant and the purchase of the local distribution system.[158] Though challenged in court by three taxpayers upon a variety of grounds, Winter Garden's referendum was upheld by the Second District Court of Appeal, as consistent with Chapter 172.[159]

Four years later, Winter Garden renewed its franchise. What happened? Florida Power, in the words of its New York-based public relations consultant, Bozell & Jacobs, unleashed a multifaceted secret public relations campaign designed "to develop lasting animosities between the six present city officials and promi-

155. *Id.* at 5.

156. *Id.*

157. *Id.*

158. City Commn. of City of Winter Garden, *Meeting Minutes* (Apr. 10, Apr. 20, Oct. 19, 1959); City of Winter Garden, *Res. for Spec. Election* (Oct. 19, 1959). The referendum to authorize the financing and purchase of Florida Power's electric distribution system took place on December 1, 1959, and passed by a vote of 680 to 394. City of Winter Garden, *Certificate of Results of Spec. Election* (Dec. 3, 1959).

159. *Ogletree v. City of Winter Garden*, 128 So. 2d 437 (Fla. 2d Dist. App. 1961). Florida Power actually funded this litigation. *See infra* n. 160 (describing a secret public relations campaign designed to stop municipalization in Winter Garden).

nent local opinion leaders" so as to stop municipalization in Winter Garden.[160] The plan worked.[161] When nearby Haines City considered municipalization four years later, the Florida Power "machine" swung into action, obtaining a franchise renewal in February 1968. In a self-congratulatory interoffice memo dated June 14, 1968, the new head of Governmental Relations, John Gleason, foreshadowed future strategies:

> We are still in business in Haines City. However, every franchise renewal from this time on will meet opposition from public power proponents who will be increasingly better organized, better financed and with greater political resources. We must begin today applying the lessons learned during the past year and one-half in Haines City.[162]

Not surprisingly, Florida's investor-owned electric utilities were also found to have violated federal antitrust laws by blocking access to transmission lines so that cities (such as Winter Garden) that considered purchasing power from a competing utility were denied access to both transmission and generation capacity.[163] Faced with mounting public criticism and antitrust lawsuits, Florida Power rushed to renew 51 out of 104 franchises early between 1969 and 1972 (a period that coincided with significant litigation to prevent the discovery of documentation of Florida Power's anti-competitive activities in the *Gainesville Utilities Department* case).[164]

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160. Bozell & Jacobs, Inc., *A Confidential Plan of Action Prepared for Florida Power Corporation* 3 (May 22, 1961) (copy on file with the *Stetson Law Review*). The *Confidential Plan* first surfaced in 1972, when it was "leaked" by a former Florida Power employee to former State Senator Gerald Lewis. *It Wouldn't Happen Now: Florida Power*, St. Petersburg Times B1 (Sept. 7, 1972).

161. City Commn. of City of Winter Garden, *Meeting Minutes* (Dec. 11, 1962). On December 11, 1962 the Winter Garden City Commission voted to renew the Company's franchise.

162. Memo. from John E. Gleason, Fla. Power Corp., to W.J. Clapp, A.P. Perez, A.H. Hines, Jr., J.S. Gracy, W.B. Shenk, R.L. Sirmons, R.V. Kirby & J.M. Ethridge, *Haines City* 2 (June 14, 1968) (copy on file with the *Stetson Law Review*).

163. *Otter Tail Power Co.*, 410 U.S. at 366; *Gainesville Utils. Dept.*, 402 U.S. at 521; *City of Gainesville*, 573 F.2d at 300–301; *Fla. Power Corp. & Tampa Elec. Co.*, 1971 U.S. Dist. LEXIS 11973 at *1.

164. From 1969 to 1972, Florida Power filed numerous challenges, including an appeal to the United States Fifth Circuit Court of Appeals of an order to compel preliminary discovery of municipal franchise documents later found to reveal anti-competitive acts by Florida Power Corporation and Florida Power & Light. *Gainesville Utils. Dept.*, 402 U.S. at

Overall, the documents disclosed from 1962 until 2002 indicated changing strategies employed by Florida Power Corporation in the renewal of franchises:

(1) Payment of the fees was begun not as a rental value payment or regulatory cost, but rather as the cost of securing the right to do business in the town;

(2) The Company sought to eliminate interval options, that is, the right of towns to exercise their purchase option during intervals shorter than thirty years;

(3) To eliminate interval options, the Company increased the level of franchise fee payments;

(4) The Company's original policy was to not renew franchises early;

(5) To avoid a potential mass exodus of cities in the early 1970s based on the disclosure of anti-competitive conduct and the opening of transmission access at the Federal Power Commission, the Company doubled its franchise fee payment and renewed almost half of its existing franchises early;

(6) Following the adoption of the Energy Policy Act of 1992, the Company commissioned the preparation of an internal "Franchise Municipalization" study that recommended the elimination of purchase options altogether; and

(7) Following the decision in *Alachua County*, the Company modified its policy to use the threat of the loss of franchise fees altogether to further restrict franchise language and prevent any possibility of future competition.

The documentary evidence overwhelmingly establishes not only a direct relationship in Florida between the existence of the purchase option and the payment of franchise fees, but the true basis for the validity of franchise fees—the value of the right to do business within the city at all.

515; *In re Florida Power Corp., Fed. Power Comm.*, No. E-7679 (Nov. 20, 1972).

After settlement of the 1970s litigation, little happened to cause cities to consider buying local electric systems in Florida. Perhaps it was the skyrocketing costs of fuel oil during that decade. Or perhaps the cities were satisfied with having received franchise fees as part of recent thirty-year renewals that increased revenues from these fees by as much as 200%.[165] Or perhaps the series of Florida Public Service Commission and court decisions in the late 1970s requiring the line itemization and "pass through" of franchise fees to municipal customers only created unrest and not a little uncertainty regarding the continuing political ability to collect the fee.[166]

Enters the Energy Policy Act of 1992 (EPAct).[167] This Act for the first time codified retail wheeling—the ability of individual retail customers to purchase power from whomever they choose—using the incumbent utility's power lines to "wheel" the power from some other provider. "By providing open access to utilities' transmission systems and encouraging more competition in power supply, EPAct provides an opportunity for municipalities to obtain lower electric rates for their citizens."[168]

For the first time in decades, Florida Power grew concerned with its ability to renew franchises, particularly since so many of the franchises renewed in the late 1960s and 1970s would again be coming up for renewal.[169] Once again, the Company commis-

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165. This litigation spawned the "1970 Standard" franchise agreement. Under the "1970 Standard" franchise agreement, Florida Power sought to impose uniform conditions on all the cities, made possible by efforts of Florida Power to modify all city charters that provided for interim recapture clauses. The general terms and conditions of the 1970 Standard franchise agreements included a thirty-year term, a six-percent franchise fee, a reduction of the fee based on an amount equal to all taxes and fees paid to the city by Florida Power, no favored nations clause, and a recapture clause executable only at the end of the franchise. Fifty-one of these 1970 Standard franchise agreements were signed between 1970 and 1974. This represented almost fifty percent of Florida Power's 104 existing franchises. Fla. Power Corp., *"1970 Standard" Franchise Agreement* (1970) (copy on file with the Author).

166. *See City of Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976) (preventing the direct pass-through of the franchise fee). The effect of this decision was cancelled by a series of decisions. *City of Plant City v. Hawkins*, 375 So. 2d 1072 (Fla. 1979); *City of Daytona Beach v. Hawkins*, 373 So. 2d 681 (Fla. 1979); *City of St. Petersburg v. Hawkins*, 366 So. 2d 429 (Fla. 1978).

167. 16 U.S.C. §§ 824–825 (2000).

168. Coopers & Lybrand, *1994 Electric Municipalization Review* 1 (Apr. 1995).

169. *See generally* Fla. Power Corp., *Franchise Study* (Feb. 19, 1992) (unpublished internal rpt.) (addressing concerns and strategies for renewing municipal franchises) (copy on file with the *Stetson Law Review*).

sioned the development of secret studies to crush once and for all the threat of municipalization in its service area and make renegotiating franchises easier.[170]

Following the completion of an internal 1994 Franchise Municipalization Study, Florida Power developed the "1995 Standard" franchise agreement. The Company first negotiated this 1995 Standard agreement with the City of Clearwater.[171] The agreement's typical terms and conditions provided for a thirty-year term, a six-percent franchise fee, the elimination of the tax offset, the inclusion of industrial revenue in the base for calculating franchise fees, a reopener clause if either party was adversely affected as a result of retail wheeling, a favored nations clause, and the elimination of the recapture clause.[172]

Florida Power was in the process of being purchased by Carolina Power & Light when an unexpected event took place: the delivery of the Florida Supreme Court's decision in *Alachua County*.[173] As feared by the dissent in that decision, Florida Power set about making a situation assessment, which called for Florida Power to develop a new franchise model based on an interpretation of *Alachua County* and national research.[174] This led to a temporary moratorium on franchise negotiations.[175] Clearly, Florida Power felt that this decision (even though it did not involve cities) would help it to gain a leg up in negotiations over renewal of the franchises, particularly with the elimination of the purchase option clauses.[176]

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170. *Id.* at 13, 18; *March 1994 Study*, *supra* n. 63; *May 1994 Study*, *supra* n. 63.

171. Clearwater, Fla., Ord. 5944-95 (Dec. 7, 1995) (copy on file with the *Stetson Law Review*).

172. *Id.*

173. 737 So. 2d 1065.

174. *Id.* at 1069 (Overton, J., dissenting) (stating that the effect of the majority opinion would be the refusal of many utilities to enter into new franchise agreements); Fla. Power Corp., *Franchise and Municipalization Activities in Florida Power Corporation (FPC) Markets—Situation Assessment* (Aug. 31, 1999) (unpublished internal rpt.) (copy on file with the *Stetson Law Review*) [hereinafter *Situation Assessment*]. E-mail from Donald N. Upton, Fla. Power Corp., to Area Managers, *Franchise Strategy* (Aug. 13, 1999) (copy on file with the *Stetson Law Review*).

175. *Situation Assessment*, *supra* n. 174; e-mail from Donald N. Upton, Fla. Power Corp., to Area Managers, *Franchise Strategy* (Aug. 13, 1999) (copy on file with the *Stetson Law Review*).

176. Situation Assessment, *supra* n. 174.

VIII. THE MUNICIPAL "FRANCHISE REVOLT" OF 2000

If one looks back on 1999, it would be difficult to imagine a more unlikely turn of events. Florida Power was proceeding to renew old franchises for thirty years without purchase options and without any increase in franchise fees. Dozens of the "1995 Standard" forms had been signed in the last five years of the twentieth century. The Company line ran something like this: We've prepared a new form franchise especially for you. It guarantees that you won't lose the significant stream of revenue you've come to rely on heavily over the last (fill in the blank) years. If we ever give someone else a better deal, we'll give you the same deal. Sorry, we can't give you a different deal because we have all these standardized contracts with these clauses that say the same thing. No, you can't have your old purchase option because we aren't for sale. Besides, the old statute that forced us to agree to them has been repealed, so it's illegal to force us to agree to such a clause. If you don't sign our agreement without the purchase option, we will not sign any franchise at all. We have a right to be in the rights-of-way because of our "overriding" duty to serve the public. The Florida Supreme Court agrees with us. So, if you want to continue to receive your franchise fees, sign our deal. Or else.[177] Even pro-business *Florida Trend* labeled the option-less proposal "a sucker's deal."[178]

Is it surprising that dozens of smaller cities (and large ones, too), when confronted with this pitch, succumbed to what one court has likened to extortion?[179] For the bolder communities, Florida Power resorted to the methods it had employed in the 1990s, including the following: preparing "feasibility" studies, based upon its 1994 internal study, to demonstrate the financial

177. This position, articulated numerous times by company employees to the Author, is outlined in diagram form in the Company's *"Franchise Management Plan 2000."* The plan directs "empowered" Area Managers that "no credibility [be] given to preempted recapture right." Fla. Power Corp., *Franchise Management Plan 2000*, Area Management Boundaries Diagram (2000) (copy on file with the *Stetson Law Review*); *Situation Assessment*, *supra* n. 174; Jim Stratton, *Power Play*, Orlando Sentinel A1 (Aug. 31, 2003).

178. Mark Howard, *Robber Barons, 2000-Style,* Fla. Trend 100 (Dec. 2000).

179. "In this case, by withholding the franchise fee, a fee charged to and collected from its customers, Florida Power is in a position to extort favorable terms from the city." *Winter Park*, 827 So. 2d at 325.

infeasibility of exercising the option;[180] hiring local attorneys and consultants to lobby commissioners; profiling municipalization proponents; attacking consultants representing the cities as biased; and unleashing public relations firms using push polls and "call blasts" to turn public opinion against any elected official suspected of supporting city ownership.[181]

Initially, Florida Power focused on several central Florida cities close to the largest municipal electric utility in the area—the Orlando Utilities Commission. Following a bitter territorial dispute between the two utilities over the right to serve recently annexed lands southeast of the Orlando International Airport, Florida Power initiated annexation litigation with Orange County against Orlando,[182] which led to a redrawing of service area lines.[183] Shortly after entry of the settlement, the Orlando Utilities Commission issued an announcement to the cities of Winter Park, Apopka, Maitland, and Altamonte Springs, advertising a seminar on "the electrifying topic of 'municipalization' of electric service."[184] By 1996, both Winter Park and Maitland had created citizen committees to study both franchise renewal and municipalization.

In 1999, after studying municipalization for four years, the small city of Maitland (Population 16,476) was confronted with accepting the 1995 Standard form or enforcing the City's purchase option, an option set to expire in 2000. The Florida Supreme Court had just issued its opinion in *Alachua County* in May.[185] Florida Power, however, was confronted with another issue that promised to enrich its board of directors (if not its stock holders) to the tune of over $69 million.[186] Florida Power, which

180. *May 1994 Study*, *supra* n. 63.

181. Stratton, *supra* n. 177, at A1.

182. The 1975 territorial agreement between the Orlando Utilities Commission and Florida Power provided that OUC gained service area upon annexation of territory. *Florida Power and Orlando Utilities End a Year-Long Territorial Dispute*, Elec. Util. Wkly. Comp. 13 (Dec. 26, 1994).

183. *Id.*

184. Memo. from Bob Haven, Gen. Manager to OUC, *Municipalization Seminar* 1 (Apr. 1995) (advertising an April 13 seminar) (copy on file with the *Stetson Law Review*).

185. 737 So. 2d 1065.

186. Test Transcr. Sheree L. Brown at 12–13, 25, *In re Rev. of Fla. Power Corp.'s Earnings*, No. 000824-EI, 12–13, 25 (Fla. Pub. Serv. Commn. Jan. 18, 2002) (copy on file with the *Stetson Law Review*).

was not for sale, was being offered up for merger to Carolina Power & Light.

After analyzing its options, the Maitland City Council voted to authorize the filing of a lawsuit to enforce its existing purchase option in November 1999.[187] Within forty-eight hours of the vote to authorize the suit, Maitland was offered a five-year renewal of its existing franchise (including the purchase option).[188] Maitland accepted. The merger went forward. But things did not work out quite the way those involved had predicted.

Following *Alachua County*, the Florida League of Cities formed an impromptu committee to negotiate a form franchise document with Florida Power that could then be used by all Florida cities within Florida Power's service area.[189] Unfortunately, one of the sticking points over the document was whether to include the purchase option.[190] After hearing about Maitland's five-year renewal, Casselberry and Winter Park asked Florida Power for "The Maitland Deal." When the Company balked, Casselberry voted to file suit to enforce its purchase option and acquire the system.[191] Winter Park later sued Florida Power under similar circumstances.[192]

IX. RECONNECTING THE LINK: CASSELBERRY AND WINTER PARK

Casselberry's original franchise with Florida Power dated from 1958. Prepared under the Company's policy to rid itself of interval recapture provisions, the 1958 agreement contained a purchase option that could be exercised "at or after" the end of the franchise's thirty-year term.[193] The Casselberry purchase option

187. This turned out to be the same month scheduled for the closing of the merger between Florida Power and Carolina Power & Light.

188. Interview with Tom Holley, former City Councilman, Maitland, Fla. (Nov. 1999).

189. The Florida League of Cities would later file an amicus brief supporting the City of Winter Park in its own dealings with Florida Power. Fla. League of Cities, Br. of Amicus Curiae, *City of Winter Park v. Fla. Power Corp.*, 887 So. 2d 1237 (Fla. 2004).

190. *Florida Cities Hear Pros and Cons of Municipalization*, Pub. Power Wkly. 4 (Dec. 13, 1999).

191. Compl. Dec. Relief, *City of Casselberry v. Fla. Power Corp.*, Case No. 00-CA-1107-16-L (Fla. 18th Cir. June 6, 2000).

192. Compl. Dec. Relief, *City of Winter Park v. Fla. Power Corp.*, Case No. CI-01-4558-39 (Fla. 9th Cir. June 1, 2001).

193. *City of Casselberry*, 793 So. 2d at 1176.

contained the same language as the options in both the 1959 Palm Bay and the 1961 North Port franchises.[194]

Prior to the expiration of the franchise, Casselberry and Florida Power entered into a new franchise agreement effective April 12, 1971.[195] Constituting one of the "1970 Standard" agreements, this franchise increased the franchise fee to six percent. Significantly, the agreement was signed when less than half the term of the original 1958 franchise had expired. Like the 1958 franchise, this franchise included a purchase option.[196]

Florida Power's arguments against the validity of Casselberry's purchase option borrowed from GDU's previously discredited arguments and added others. Florida Power argued for voiding the option based upon the following claims:

> (1) Casselberry failed to allege that it was actually going to buy the facilities;
>
> (2) Casselberry failed to authorize the purchase;
>
> (3) the City lacked the financial ability to buy the facilities;
>
> (4) Casselberry's right to buy did not arise until the expiration of the franchise;
>
> (5) the City failed to allege that it had the ability to operate and maintain the system;
>
> (6) the City's attempt to enforce its option was really a "territorial dispute" and therefore subject to FPSC jurisdiction under Section 366.04(1)(e);
>
> (7) the Company's rates could be affected since there was a threat of undervaluation and no uniformity of proceedings should other cities follow suit; therefore, the valuation and purchase option were preempted by the FPSC;

194. *Supra* sec. VI.
195. *City of Casselberry*, 793 So. 2d at 1176.
196. *Id.*

(8) use of the arbitration proceedings would constitute a taking;

(9) repealed Section 167.22 was unconstitutional because it denied the Company access to courts and due process and was vague and indefinite because there were no valuation standards;

(10) because the Company could not anticipate retail wheeling, the repeal of the referendum requirement in chapter 172, Florida Statutes, and did not take into account the amendments to Chapter 366, Florida Statutes, creating the Grid Bill; the option was unenforceable as impracticable, impossible, unjust, and inequitable;

(11) because the purchase option was mandated and not negotiated, it was therefore void;

(12) the repeal of the purchase option statute caused the option to cease to exist;

(13) the option was contrary to the public interest;

(14) and finally, because the 1899 repealed statute contemplated the adoption of other laws, the option was void since those laws were never adopted.[197]

Casselberry responded to these arguments with the following claims:

(1) Florida Power was estopped from denying its obligations under the franchise because it accepted benefits under the franchise;

(2) franchise rights must be strictly construed in favor of the state and against the grantee;

(3) prior Florida circuit and appellate courts upheld franchise purchase options as in the public interest;

197. Def.'s Br., *City of Casselberry*, 793 So. 2d 1174.

(4) the FPSC had no jurisdiction over the sale of electric utilities; there was nothing in Chapter 366 that required FPSC approval before assets of an electric utility were transferred;[198]

(5) the FPSC had no jurisdiction over Casselberry until Casselberry purchased the system;

(6) arbitrating the value and exercising the purchase option did not impact Florida Power Corporation's service and rates.

(7) Chapter 366 did not affect a city's rights under its franchise agreement;[199]

(8) by accepting the privilege of the franchise, Florida Power waived its rights to have the value of the system established in a courtroom under eminent domain principles;

(9) agreements to arbitrate a purchase price under a purchase option were in the public interest;[200]

(10) the doctrine of commercial frustration did not apply in a case where the intervening event—exercise of the purchase option—was reasonably foreseeable and could and should have been controlled by provisions of the contract;[201]

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198. For an explanation of this matter, see Florida Attorney General Opinion 2005-14 (Mar. 3, 2005). As recently as 1994, Florida Power not only agreed with this assessment, but sought a legislative amendment that would have granted "the FPSC authority to resolve franchise issues between municipalities and utilities." *March 1994 Study*, *supra* n. 63, at 16; *see* Fla. Stat. § 367.071(4)(a) (1999) (expressly recognizing the FPSC's authority to approve sales of water and wastewater systems to governmental authorities but provides that the sale "shall be approved as a matter of right."). Adopted in 1971, this section predates the so-called "Grid Bill." Unlike water and wastewater utilities, the FPSC has *never* been authorized to issue exclusive certificates of authorization to electric utilities. Fla. Stat. § 367.021(1) (1999).

199. In fact, the FPSC, as a matter of course, avoids intervening in franchise issues. Fla. Stat. § 366.11(2) (1999).

200. *Oregon-Washington Water Serv. Co. v. City of Hoquiam*, 28 F.2d 576, 578 (9th Cir. 1928); *Oppenheimer v. Young*, 456 So. 2d 1175, 1777 (Fla. 1984); Pond, *supra* n. 38, at 1743.

201. *Hilton Oil Transport v. Oil Transport Co.*, 659 So. 2d 1141, 1147 (Fla. 3d Dist. App. 1995).

> (11) and, a contractual provision did not have to be negotiated to be enforceable. Franchise purchase option contracts were in the public interest.[202]

Following a day-long hearing, Judge Debra Nelson issued an order compelling arbitration, effectively rejecting all of Florida Power's proposed arguments and upholding the contract.[203]

Florida Power then appealed to the Fifth District Court of Appeal.[204] In its initial brief, Florida Power essentially raised two points. First, the Company argued that the trial court invaded the exclusive jurisdiction of the FPSC. The Company again argued that municipal ordinances were preempted by Florida's electrical regulatory scheme insofar as the buyout clause would lead to the deconstruction of the Florida Power system, thus having a direct impact on the reliability of Florida's electric power grid and Florida Power's service to remaining customers.[205] Florida Power's second point focused on the alleged "standardless arbitration" ordered by the trial court. This "standardless arbitration," the Company argued, lacked valuation standards, which violated due process.[206]

Ironically, the oral arguments before the Fifth District took place in the "birthplace" of Florida purchase options, the City of St. Augustine. Following oral arguments in June 2001, the Fifth District handed down a decision validating purchase options.[207] As in the GDU cases, the Fifth District rejected Florida Power's arguments regarding invalidation because of Florida Public Service Commission jurisdiction:

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202. *E.g. City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 180 (1910); *City of Indianapolis*, 144 F. at 649; *Honolulu Rapid Transit Co. v. Dolim*, 459 F.2d 551 (9th Cir. 1972); *City of Kiowa v. C. Tel. & Utils. Corp.*, 515 P.2d 795, 801 (Kan. 1973); *Bd. of Water Commrs. v. Village of White Plains*, 71 A.D. 544 (N.Y. App. Div. 1902); *Madison Cablevision v. City of Morganton*, 386 S.E. 2d 200, 207 (N.C. 1989); *Rose City Transit Co. v. City of Portland*, 525 P.2d 1325 (Or. App. 1974); *Borough of Hanover v. Hanover Sewer Co.*, 96 A. 132 (Pa. 1915); *City of Bremerton v. Bremerton Water Power Co.*, 153 P. 372 (Wash. 1915); *Wis. Power & Light Co. v. Pub. Serv. Commn.*, 261 N.W. 711 (Wis. 1935); *Oshkosh Waterworks Co. v. R.R. Commn. of Wis.*, 152 N.W. 859 (Wis. 1915); *Mo. Pub. Serv. Commn. re: Kan. City Power & Light Co.*, 43 Pur.3d 433 (Mo. Pub. Serv. Commn. 1962).

203. *City of Casselberry*, 793 So. 2d at 1174.

204. *Id.*

205. *Id.* at 1177.

206. *Id.* at 1176–1177.

207. *Id.* at 1180–1181.

> While the [F]PSC can amend private contracts in some circumstances, FPC's arguments are inapplicable in the instant case. The [F]PSC has not intervened in this action nor has the [F]PSC been asked to approve rates, service, or territorial agreements. Moreover, the [F]PSC has no jurisdiction over Casselberry at this time. Therefore, the trial court has proper jurisdiction of this case until such time as Casselberry becomes a retail electric utility or exercises its purchase option.[208]

Citing *City of Puducah v. Kentucky Utilities Co.*,[209] the Fifth District specifically found that the purchase option was not only valid, but still binding on the parties. The Fifth District rejected Florida Power's arguments regarding FPSC jurisdiction, unconstitutional impairment of contract, lack of valuation standards, duress, and others.[210] The court went further and provided guidance concerning appointment of arbitrators, the skills the arbitrators should possess, and the standards that would apply in the valuation of the assets of an electric utility.[211] An arbitration was held regarding the Casselberry system in September 2002. In that proceeding, Florida Power argued for a value of approximately $50 million; Casselberry argued that the system was worth $13 million. The arbitrators returned a value of $22.3 million.[212]

Additional court orders validating purchase options and compelling arbitration were entered in cases involving Winter Park, Apopka, and Longwood. Furthermore, the Second District Court of Appeal followed the Fifth District's reasoning in *Casselberry* to validate the Town of Belleair's franchise purchase option in the case of *Florida Power Corp. v. Town of Belleair*.[213] Other jurisdictions have also continued to follow the 135-year string of unbroken validation orders.[214]

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208. *Id.* at 1178.

209. 264 S.W.2d 848, 854 (Ky. 1953).

210. *City of Casselberry*, 793 So. 2d at 1174–1181.

211. *Id.*

212. Arb. Award, *City of Casselberry*, 793 So. 2d 1174 (awarded Sept. 2002) (copy on file with the *Stetson Law Review*).

213. 830 So. 2d 852, 855 (Fla. 2d Dist. App. 2002), *rev'd in part*, *Town of Belleair v. Fla. Power Corp.*, 897 So. 2d 1261 (Fla. 2005).

214. *E.g. Ill. Am. Water Co. v. the City of Peoria & Peoria Area Advancement Group*, 774 N.E.2d 383, 386 (Ill. App. 3d Dist. 2002).

Following Judge Nelson's validation of the Casselberry purchase option, the Winter Park City Commission began to seriously consider preserving its seventy-three-year-old purchase option. Florida Power had previously considered Winter Park a "sure thing" for renewing its franchise in spring 2000. After all, the mayor of Winter Park was a Florida Power employee. While service had degraded seriously,[215] the Company believed it still had the political muscle to obtain a renewal of the franchise.[216]

Politics is an unpredictable affair. In the space of a few short months, two political newcomers to the City Commission—John Eckbert and Major General Doug Metcalf—objected to Florida Power's negotiation position that it would sign no agreement containing a purchase option. Since the mayor could not vote due to the conflict, a number of City Commission decisions related to franchise renewal issues resulted in a 2–2 deadlock.

As a part of its due diligence, however, Winter Park uncovered a rather lengthy, interesting history related to the provision of electric services in Winter Park. Specifically, the City discovered that it had originally owned the electric system in 1913, selling it to Florida Power's predecessor in interest, the Florida Public Service Company, in 1927.[217] The 1927 franchise contained interval recapture clauses.[218]

Furthermore, Winter Park rediscovered documents indicating that it had actually attempted to municipalize its system before. Almost all vestiges of the prior acquisition had been erased; only a handful of documents remained in the city archives and in yellowing newspaper accounts at the city library to document Winter Park's first municipalization attempt between 1945 and 1947.[219] During that attempt, Florida Power lowered its rates, placed the president of the local college on its board of directors, ran numerous ads in the local newspaper, and not surprisingly, received edi-

215. Orlando Wkly., *Power, Corruption, and Lies*, http://orlandoweekly.com/features/story.asp?id=3189 (last updated Aug. 28, 2003).

216. The Author witnessed a conversation at a dinner in Tallahassee in March 2000 when Don Upton, Florida Power's Government Relations head, told another guest, Darryl Kelley, then head of the Economic Development Commission of Mid-Florida, that the Company believed it had "three votes" to secure renewal of the franchise and credited the "political seed" program for the success.

217. *City of Winter Park*, 887 So. 2d at 1239 n. 1.

218. *Id.* at 1238.

219. Orlando Wkly., *supra* n. 215.

torial support.[220] Municipalization opponents won at the polls, 1,068 to 124.[221] Winter Park relented and re-signed a franchise in June 1947.[222] The 1947 franchise contained ten-year interval recapture provisions with a one-percent increase in franchise fees for each additional ten years under the franchise. As with Casselberry, Winter Park received an early-renewal franchise that extended the term an additional thirty years and granted the six-percent franchise fee.[223]

The impact of this additional information grew, while residents felt that electric service had degraded.[224] This led to one of the commissioners, Commissioner Barbara DeVane, switching her stance and demanding that the utility company improve service and continue the purchase option.[225] When Florida Power balked, the City Commission voted to sue to enforce its purchase option rights. Though the Company temporarily delayed the lawsuit, an intervening feasibility study by the City increased interest in municipalization. When the six-month extension expired in June 2001, Winter Park adopted a unique electric franchising ordinance containing a "holdover clause" and authorized the filing of the suit to validate the franchise purchase option.[226]

Because the time for expiration had passed, Winter Park's franchise expired before a court order could be rendered on its enforceability. This meant that Florida Power would have the opportunity to stop collecting franchise fees from its customers, which it did.[227] Winter Park's loss of $1.6 million a year was perceived to have a chilling effect on its ability to continue the lawsuit. Therefore, Winter Park sought and obtained a temporary

220. *Id.*

221. *Id.*

222. *City of Winter Park*, 887 So. 2d at 1239 n. 1.

223. *Id.*

224. Chad Watt, *A Legacy of Power Problems*, Orlando Bus. J. 1, 10 (June 13–19, 2003); Stratton, *supra* n. 177, at A1.

225. E-mail from Kenneth C. Cone, Regl. Manager, Fla. Power Corp., to Rodney E. Gaddy, Vice Pres., Fla. Power Corp., *Winter Park* (Dec. 8, 2000) (copy on file with the *Stetson Law Review*).

226. The ordinance set city regulations and requirements for granting electric distribution system franchises in the city, mandated the inclusion of purchase options, and specifically provided that those holders of expired franchises would be treated as holdover tenants. Winter Park Mun. Code (Fla.) Art. VI, §§ 102-206–102-223 (2001).

227. *City of Winter Park*, 887 So. 2d at 1239.

injunction requiring Florida Power to continue to collect and pay the franchise fees.[228]

Recognizing the chilling effect the loss of the fees would have, Florida Power again sought to block Winter Park's receipt of fees, and successfully obtained a temporary order directing the fees into escrow.[229] Without the continued receipt of the fees, Winter Park was concerned that the case might be linked to an increase in taxes and therefore become too untenable to continue.[230] The City had one option left: schedule a bench trial to determine the ultimate validity of the right to receive the franchise fees. Florida Power first argued the inappropriateness of issuing an injunction for the payment of money, and based the rest of its argument solely on *Alachua County*, arguing that Winter Park was imposing a fee (since the original franchise had expired) and that there was no relationship between the fee charged and the cost of regulation.[231] For its part, Winter Park admitted evidence including, as market data, the annual cost of maintaining the streets and rights-of-way, the number of city police and fire service responses to downed power lines, the area of land occupied by Florida Power in Winter Park, and Florida Power's own franchises, all of which contained a six-percent franchise fee.[232] Winter Park also outlined the differences between *Alachua* and its case, which were numerous and significant.[233] The City further argued the equitable consideration of allowing a for-profit corporation to continue to utilize property held in trust for the public to generate profits while pay-

228. Or. Granting Pl.'s Mot. Temp. Inj., *City of Winter Park,* 5D01-2470 (July 9, 2001).

229. *Id.*

230. Interview with John Eckbert, Commn., City of Winter Park (Oct. 2005).

231. *City of Winter Park v. Florida Power Corp.*, No. CI0-01-4558 (Fla. 9th Cir. Nov. 5, 2001) (available at http://www.ci.winter-park.fl.us/2002/news/prsreleases/11-05-01.PDF #search=winter%20park%20franchise%201971). Florida Power also argued the companion case of *Leon County v. Talquin Electric Cooperation, Inc.*, No. 99-5145 (2d Cir. Ct. Oct. 2000), *aff'd*, *Leon County v. Talquin Electric Cooperation, Inc.*, 795 So. 2d 1142 (Fla. 1st Dist. App. 2001) (per curiam). In this case, Talquin Electric Cooperative attacked the validity of a 1983 Leon County ordinance that had imposed a franchise fee upon Talquin's use of the County's rights-of-way. At the time, Talquin concurred in the concept of the franchise fee and offered no objection. However, following *Alachua County*, Talquin ceased paying the charge and obtained a summary judgment against the validity of the charge. Given the results of the Supreme Court's decision in *Winter Park*, the effect of this decision has been severely eroded.

232. *City of Winter Park*, No. CIO-01-4558 at 4–5.

233. *City of Winter Park*, 887 So. 2d at 1239–1242.

ing nothing.[234] This argument was encapsulated in the battle cry, "If you stay, you must pay."

Recognizing that it lacked jurisdiction to enter a partial final judgment, the court nevertheless made preliminary findings:

> (1) The City of Winter Park does have the right to negotiate for and charge a franchise fee that is reasonably related to City's costs of maintaining and regulating the utility's use and occupation of City's land as well as the reasonable value of such use and occupation to the utility.
>
> (2) The long-standing fee of [six-percent] was bargained for and does bear a reasonable relation to the costs of maintaining and regulating the utility's use and occupation of city land, as well as the reasonable value of such use to the Defendant.
>
> (3) Even though the franchise agreement expired, FPC continues to occupy, use and reap benefits from the City's property. Until there is a re-purchase, or new agreement executed, FPC has the status of a holdover tenant at sufferance, subject to the terms of the expired agreement, including the [six-percent] franchise fee.[235]

The court directly rejected Florida Power's arguments based on *Alachua*. In *Alachua*, the parties had stipulated that the fee was not related to the extent of the use of the rights-of-way, rental value, the cost of regulation, or the cost of maintenance; the fee was not the result of a bargained-for agreement; Florida Power could not avoid the fee except through removal of its business; and the revenue raised from the fee was intended to fund general county operations and reduce ad valorem taxes.[236]

In *Winter Park*, on the other hand, the fee was established seventy years before negotiations. It did not matter to the court that the agreement had expired; the court found that

> FPC has continued to enjoy all of the benefits of the expired contract while refusing to pay any of the city fees. It provides

234. *City of Winter Park*, No. CIO-01-4558 at 5–7.
235. *Id.* at 6–7.
236. *Alachua County*, 737 So. 2d at 1066–1067.

> electricity to customers and collects revenue for that service. It receives additional benefits from its use of city property by renting its utility poles to other entities such as telecommunications and cable companies. Such benefits add to the value of the property rights which City gave to FPC in exchange for the fee.[237]

The court also accepted the concept that Florida Power's relationship to Winter Park could be analogized to that of a holdover tenant to a landlord:

> [T]he Florida Supreme Court emphasized that it was the use of the fee, rather than the term by which Alachua County referred to it, which made it an unconstitutional tax. . . . The Florida Supreme Court also stated that a lawful franchise fee is "in the nature of a rental," for the "occupation of certain portions of their streets" by utility companies. Thus, while the franchise fee technically is not rent, and FPC is not literally a holdover tenant, the nature of the relationship, the obligation breached, and the remedy are analogous.[238]

In effect, the court adopted Winter Park's equity argument by stating that the Company should meet its obligations during the period it reaped economic benefits.

After dealing with the jurisdictional issues, Judge James Stroker entered a judgment granting Winter Park's motion regarding the validity of the franchise fees, and ordering the release of the franchise fees to Winter Park.[239] For the time being, Winter Park's municipalization attempt had been saved.

Each of these arguments was replayed before the Fifth District.[240] For its part, Florida Power continued to rely on *Alachua County*.[241] Winter Park continued to argue the differences between its situation and *Alachua County*.[242]

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237. *City of Winter Park*, No. CIO-01-4558 at 6.

238. *Id.* at 5 (citations omitted).

239. Partial Final Judgm. at 1–2, *City of Winter Park v. Fla. Power Co.*, No. CIO-01-4558 (Fla. 9th Cir. Dec. 20, 2001).

240. Appellant's Br., *City of Winter Park*, 827 So. 2d 322; Appellee's Ans. Br., *City of Winter Park*, 887 So. 2d 322.

241. Appellant's Br. at 22–23, *City of Winter Park*, 827 So. 2d 322.

242. Appellee's Ans. Br. at 34–37, *City of Winter Park*, 827 So. 2d 322. The City had

In a similar case from Pinellas County, the Second District overturned a circuit court's temporary injunction that required Flower Power to continue paying franchise fees when its franchise with the Town of Belleair expired, accepting Florida Power's arguments that *Alachua* applied:

> Here, the trial court determined that Belleair had "a clear legal right to a temporary injunction to maintain the status quo." We disagree. The trial court was without authority to order FPC to continue paying the franchise fee after the franchise agreement expired. The trial court cannot, by injunction, extend the terms of a contract after its expiration. Additionally, without the franchise agreement to support the negotiated franchise fee, a [six-percent] flat fee constitutes an illegal tax pursuant to [*Alachua*] . . ., because it bears no relationship to the actual cost of regulation or maintenance of Belleair's rights-of-way.[243]

Approximately three weeks later, however, the Fifth District validated Judge Stroker's injunction and Winter Park's fee.[244] In a two-to-one decision, Judges Thomas Harris and Winifred Sharp agreed with Winter Park that it "would be highly unusual and unfair to permit Florida Power to stay in possession and receive all the benefits of its now expired agreement and yet be absolved of all responsibility assumed by it as a condition justifying its very occupancy."[245] The majority opinion directly addressed and distinguished *Alachua*, following Judge Stroker's opinion:

> While some of the statements in *Alachua County* seem appropriate to this case, because of the context in which such

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also uncovered a case from New Mexico with remarkably similar facts. In *City of Las Cruces v. El Paso Electric Co.*, the Tenth Circuit upheld a federal magistrate's finding that the City of Las Cruces was entitled to continue to collect a two-percent franchise fee when El Paso Electric stopped paying. 166 F.3d 1220 (10th Cir. 1999) (table). In the *Las Cruces* decision, an eighty-three-year-old franchise had expired; Las Cruces had a pending eminent domain case and lacked the ability to oust the utility. *City of Las Cruces*, 1997 WL 1089567, *3 (D.N.M. May 16, 1997). El Paso refused to continue paying the fee but still conducted its business for profit using Las Cruces' right-of-way. *Id.* at *1. In fact, in that case, El Paso actually pocketed the franchise fee after collecting it from its customers. *Id.* at *1, *3 (noting that "it is unjust for EPE [El Paso Electric] to charge and collect rates that include charges for a franchise fee and not to pay the franchise fees to the City").

243. *Town of Belleair*, 830 So. 2d at 854 (citations omitted).

244. *City of Winter Park*, 827 So. 2d 323.

245. *Id.* at 324 n. 2.

> statements were made, their relevancy herein is somewhat diminished. In *Alachua County*, the county was attempting to generate new revenues in face of a limitation on its taxing authority and hoped to justify the new assessment as a franchise fee, or as a follow-up position, as rental of its right-of-way. This new "fee" was unilaterally imposed by ordinance. In our case, however, there is no legitimate concern that a new tax is being imposed. The parties negotiated a franchise agreement which gave Florida Power certain rights and imposed on Florida Power an obligation to pay the city a certain sum for exercising these rights. When 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. There is no logical reason to permit Florida Power to continue exercising the rights conferred by the expired franchise agreement during this period of renegotiation and yet relieve it of its accompanying obligations. A continuation of the originally agreed-to fee during this extended period is simply not a new tax.[246]

Significantly, the Fifth District seemed genuinely offended by Florida Power's argument indicating that it was

> in a position to extort favorable terms from the [C]ity. The [C]ity's expenses for maintaining its property and regulating the utility continue unabated while the payments of the franchise fee are being withheld. The [C]ity must either give in to the demands of Florida Power, impose higher taxes on its citizens, or dip into its reserve to meet costs which should be paid by the users of electricity.[247]

The court ended its opinion by certifying conflict with the *Belleair* decision.[248]

Having based its, and the Florida investor-owned electric industry's, argument on *Alachua County*, Florida Power continued to rely heavily on the case in its arguments to Florida's Supreme Court. The Company argued that (1) taxes can *only* be imposed by

246. *Id.* at 323–324 n. 1.
247. *Id.* at 325.
248. *Id.*

general law;[249] (2) *Alachua County* prohibits the unilateral imposition of a flat-rate-percent-of-revenues-franchise fee;[250] and (3) Winter Park failed to prove that the six-percent fee was a valid franchise fee, linked to rental value, based upon the cost of regulation, or based upon the costs Winter Park incurred in maintaining its rights-of-way.[251] Besides, Florida Power further asserted, when you add the number of judges who have ruled against the validity of franchise fees since *Alachua County* and compare that number to those judges who have voted to validate fees, more judges have invalidated the fees.[252]

Amicus Curiae briefs supporting Florida Power were filed by Tampa Electric Company (TECO), Florida Power & Light (FP&L), and the Florida Electric Cooperative Association (FECA).[253] TECO argued that (1) unilaterally imposed charges cannot exceed a local government's cost of regulating the use of rights-of-way; (2) a "vast statutory scheme" preempts local governments from imposing rental charges on public roads; and (3) public roads are not necessarily owned by local governments.[254] FP&L argued that (1) without a written franchise agreement, there can be no valid fee; (2) franchise fees are paid for the franchise, not the use of the rights-of-way; (3) cities can regulate, but not rent, the rights-of-way; (4) a court cannot rewrite the franchise contract; and (5) the Fifth District's decision conflicts with *Alachua County*.[255] FECA, whose members hold city franchises, argued primarily the "chilling effect" the ability to continue to collect the fee after expiration of the franchise would have on further franchises.[256]

Winter Park was joined by the Florida League of Cities in supporting Judge Stroker's decision and the Fifth District's majority opinion.[257] First, Winter Park argued that it possessed the

249. Appellant's Br. at 15, *City of Winter Park*, 887 So. 2d 1237.

250. *Id.* at 18.

251. *Id.* at 19–32.

252. *Id.* at 32–35.

253. Br. of Tampa Elec. Co., *City of Winter Park*, 887 So. 2d 1237; Br. of Fla. Power & Light, *City of Winter Park*, 887 So. 2d 1237; Br. of Fla. Elec. Coop. Assn., *City of Winter Park*, 887 So. 2d 1237.

254. Br. of Tampa Elec. Co. at 4–6, 10–11, *Winter Park*, 887 So. 2d 1237.

255. Br. of Fla. Power & Light at 5–21, *Winter Park*, 887 So. 2d 1237.

256. Br. of Fla. Elec. Coop. Assn. at 3, *Winter Park*, 887 So. 2d 1237.

257. For a thorough summary of the arguments supporting municipal authority, see Br. of Fla. League of Cities at 11–13, *Winter Park*, 887 So. 2d 1237.

inherent home-rule authority to grant franchises within its city limits and the concomitant municipal prerogative to provide electric service and preclude competition within those same boundaries.[258] In response to Florida Power and TECO's argument that the Florida Legislature's "vast statutory framework" preempted Winter Park from charging rent, Winter Park argued that Chapter 366 of the Florida Statutes lacked any express preemption of franchise fees,[259] and further, existing statutes, case law, and other sources indicated that municipal authority remained undiminished.[260]

What of the argument that as state-regulated utilities, investor-owned power companies have an equal right with cities to use the public rights-of-way? First, Winter Park argued the "public trust" doctrine, that the City holds these rights-of-way in trust for the public and cannot alienate title to them.[261] In effect, allowing a public utility to continue to serve city residents without a valid franchise would nullify a city's inherent right to grant (or refuse to grant) franchises and to control the public rights-of-way.[262]

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258. Appellee's Br. at 25–26, *Winter Park*, 887 So. 2d 1237.

259. *Id.* at 27. An express preemption by the Florida Legislature must be specifically and directly contained in a statute; an implied preemption can exist only where the legislative scheme is so pervasive as to evidence an intent to preempt, and where strong public policy reasons exist to support the preemption. *Tallahassee Mem. Reg. Med. Ctr. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st Dist. App. 1996); *Hillsborough County v. Fla. Rest. Assn.*, 603 So. 2d 587, 591 (Fla. 2d Dist. App. 1992); *Lowe v. Broward County*, 766 So. 2d 1199, 1207 (Fla. 4th Dist. App. 2000).

260. Appellee's Br. at 28–29, *Winter Park*, 887 So. 2d 1237. Indeed, not only did Chapters 166, 337, and 366 contain no mention of a preemption, but Section 366.11 of the Florida Statutes expressly preserves municipal electric franchise powers. The 1951 version of Chapter 366 contained an express reference to the preservation of Section 167.22, the purchase option statute. Although repealed and replaced by Section 166.042 in 1973, the reference to Section 167.22 in Section 366.11 was left unchanged when the so-called "Grid Bill" was adopted in 1974. Fla. Stat. § 366.11(2) (1975); 1974 Fla. Laws ch. 74-196. The express reference to a repealed statute was not deleted until 1977 as part of a scrivener's revision bill. 1977 Fla. Laws ch. 74-104. Presumably, if the Florida Legislature intended that these broad municipal electric franchise powers were to be preempted in 1974, some affirmative statement would have been made and reference to an already-repealed statute would have been deleted. *See also Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96, 101 (Fla. 1st Dist. App. 1994).

261. Appellee's Br. at 53, *Winter Park*, 887 So. 2d 1237; *see also Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986); *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893); *Water Control Dist. v. Davidson*, 638 So. 2d 521 (Fla. 5th Dist. App. 1994) (finding that title held by political division of the State is not extinguished by the Marketable Record Title Act).

262. Appellee's Br. at 33, *Winter Park*, 887 So. 2d 1237; *see also United Tel. Co.*, 899 P.2d at 489 (Kan. 1995); *City of Wilson v. Weber*, 166 P. 512, 514 (Kan. 1917) (recognizing

Furthermore, Winter Park advanced a number of equitable arguments to support its position that Florida Power must pay for its franchise rights. These arguments included implied contract and quantum meriut, unjust enrichment, equitable estoppel, and the creation of a "holdover tenancy."[263] Winter Park essentially advanced the notion that the Company's use of the rights-of-way without compensation constituted unjust enrichment in that (1) a benefit was conferred; (2) the benefit was accepted by the Company; and (3) circumstances indicated the result would be harsh and inequitable.[264]

Finally, Winter Park addressed *Alachua County*, first, by noting the line of cases (including *Alachua County*) that rejected the notion that franchise fees are per se a "tax."[265] Winter Park and the Florida League of Cities also focused on the significant differences between the "privilege fee" in *Alachua County* and the franchise fee in *Winter Park*.[266]

Before oral arguments occurred and a decision was rendered, two significant events transpired. First, the Arbitration Panel rendered its decision, finding the value of the electric distribution system to be $31.35 million.[267] Florida Power had originally argued for close to $100 million; Winter Park countered that number at $16.5 million.[268] Following the Winter Park arbitration, the City held a referendum for its citizens to decide whether to borrow money to buy the electric distribution system. Florida Power

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city's right to regulate utility); *Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200, 212 (N.C. 1989).

263. Appellee's Br. at 35–41, *Winter Park*, 887 So. 2d 1237.

264. *See Charter Commun., Inc. v. Santa Cruz*, 133 F. Supp. 2d 1184, 1188 (N.D. Cal. 2001), *rev'd*, 304 F.3d 927 (9th Cir. 2002) (recognizing a holdover tenancy created after the expiration of a franchise term); *City of Las Cruces*, 1997 WL 1089567 at *1 (upholding unjust enrichment claim); *Wingert v. Prince*, 123 So. 2d 277, 278–279 (Fla. 2d Dist. App. 1960) (discussing holdover tenancy).

265. Appellee's Br. at 45–46, *Winter Park*, 887 So. 2d 1237; *see also City of Oviedo*, 704 So. 2d at 207 (recognizing that cities have the power to charge for the use of their streets); *City of Plant City*, 337 So. 2d at 973; *City of Pensacola v. S. Bell Tel. Co.*, 37 So. 820, 824 (Fla. 1905).

266. Appellee's Br. at 46–48, *Winter Park*, 887 So. 2d 1237; Br. of Fla. League Cities at 16, *Winter Park*, 887 So. 2d 1237.

267. Arb. Award at 10, *City of Winter Park*, No. CIO-01-4558. In addition, Florida Power received the right to "stranded costs" beginning at $10,737,000 but reducing to zero if Winter Park did not exercise its option until 2010. *Id.* at 17–18.

268. Florida Power argued that $70 million should be paid for the distribution system, plus approximately another $30 million for "stranded costs." *Id.* at 14–17.

spent half a million dollars for television and print ads to fight the referendum.[269]

This time, voters approved the financing and exercise of the option 5,384 to 2,413, or sixty-nine percent to thirty-one percent.[270] The transfer, however, would be postponed for almost two years while the parties sought to agree on the protocol for transferring the system.[271] Perhaps, Florida Power hoped any number of events might take place to prevent the transfer. For example, Winter Park had yet to secure an alternate source of generation, garner financial backing, or decide upon an operations team.[272] Or perhaps the FPSC would interpret its legislative authority to require Winter Park to secure FPSC consent before acquiring the electric distribution system.[273] Or maybe, just maybe, Florida Power would prevail at the Florida Supreme Court, saddling Winter Park with the obligation to pay back over $4 million in franchise fees collected since June 2001. The addition of such a significant sum to the financial pro forma could have stopped the acquisition dead in its tracks.

Fortunately for Winter Park, the Florida Supreme Court's October 28, 2004 ruling laid this issue to rest. After summarizing the four-year struggle that culminated in the appeal, the Court disassembled piece by piece Florida Power's *Alachua County* argument:

> The reality, however, is that *Alachua* does not support FPC's position. FPC misinterprets judicial precedent because it divorces the principles of law established in *Alachua* from the underlying facts as it attempts to invoke the decision to serve its own ends. The trial court deflated FPC's argument by distinguishing the instant matter from *Alachua*. The dis-

269. Jim Stratton, *Progress Energy Pumps $480,000 into Latest Blitz*, Orlando Sentinel A1 (Sept. 7, 2003).

270. Stratton, *supra* n. 177; Louis Hau, *Voters in Winter Park Boot Progress Energy*, St. Petersburg Times A1 (Sept. 10, 2003).

271. Power Talk, *Our People Hold the Power*, http://www.ci.winter-park.fl.us/200/powertalk/PowerTalk_MayJune05.pdf (updated May/June 2005).

272. The transfer did not occur until June 1, 2005. *Id.*

273. This issue was not resolved until the issuance of Florida Attorney General Opinion 2005-14, in which the Florida Attorney General said that Winter Park did not need permission from FPSC. Fla. Atty. Gen. Op. AGO 2005-14 (Mar. 3, 2005) (available at http://myflorida.legal.com/ago.nsf).

> trict court echoed that refrain. We now add our voice to the chorus.
>
> The distinctions between the instant matter and the scenario in *Alachua* are as clear as they are numerous. In *Alachua*, this Court reviewed a trial court order declaring a proposed bond issue invalid. A central issue in the bond validation proceeding was whether a privilege fee imposed by Alachua County on electric utilities using the public rights-of-way constituted an illegal tax. The ordinance at issue imposed a fee of three percent of the gross revenues generated by electric utilities within the county, and permitted the utilities to pass the expense through to their customers. To avoid having the fee declared an unconstitutional tax, the county argued that the fee was justifiable as a reasonable rental fee, user fee, or franchise fee.
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> • • •
>
> While it is true that the instant matter also involves the assessment of a percent-of-revenue fee against an electric utility, that is where the similarities between this action and *Alachua* end. Importantly, the fee at issue here is not a novel attempt by a local government to exact revenue from a right-of-way user, but arose from a decades-old electric utility franchise granted by Winter Park to FPC. The franchise gave FPC the "right, privilege and franchise to construct, operate and maintain in the said City of Winter Park, all electric power facilities" for the purpose of supplying electricity to the City's inhabitants. Thus, during its effective period, the franchise agreement constituted a permissible bargained-for exchange pursuant to which FPC ceded six percent of revenues in exchange for access to the City's rights-of-way, the monopoly electricity franchise, and the City's corresponding relinquishment of its power to provide electric service in the community.[274]

Aside from rejecting the *Alachua County* argument, the Court was clearly concerned with the public policy implications of per-

274. *City of Winter Park*, 887 So. 2d at 1239. Perhaps the Court's use of the term "chorus" was a pointed response to Florida Power's use of judicial "mathematics" in summing the judges on opposing sides of the argument. *Winter Park*, 887 So. 2d at 1239–1240 (citations omitted). Appellant's Br. at 32–33, *Winter Park*, 887 So. 2d 1237.

mitting "a utility subject to a maturing franchise agreement" to withhold fees upon franchise expiration: "Such an interpretation would gravely impact the renegotiation process by vitiating any motive the utility would have for entering into contractual arrangements beyond the initial franchise agreement."[275] The Court accepted Judge Stroker's findings that Winter Park had validly established the nexus for the fee, expressly acknowledging Winter Park's use of market data, right-of-way area occupied by the utility, the total (not apportioned) cost of maintenance, and the frequency of city response to downed power lines.[276]

Finally, the Court evidenced a clear concern for the equities of the case.[277] Acknowledging that both parties continued to perform under the franchise, the Court stated that "[u]nder this scenario, it is perfectly proper to imply a contract at law."[278] The Court also agreed that "[i]t would be wholly inequitable to allow FPC to profit in this manner" if it continued to receive revenues while paying Winter Park nothing.[279] It agreed, too, with the Fifth District's "holdover tenant" analogy.[280]

The Court also expressly disapproved the Second District's decision in *Florida Power Corp. v. Belleair*,[281] and later rendered a separate opinion quashing that decision.[282] Finally, the Court rendered perhaps its most telling statement: "To exclude such a remedy from the reach of the courts would upset the balance of franchise negotiations and renegotiations, and threaten to disrupt sustainable electric service to the citizens of this state."[283]

X. CONCLUSION

On June 1, 2005, Winter Park took title to the electric system within its city limits. All litigation between Winter Park and Florida Power ended. During the "Franchise Rebellion," no fewer than

275. *Id.* at 1240.

276. *Id.* at 1241, 1241 n. 3.

277. No less than three justices interrupted each other at the beginning of oral arguments, each trying to get Florida Power to answer the same question: "What part of the franchise's benefits aren't you receiving?"

278. *City of Winter Park*, 887 So. 2d at 1241.

279. *Id.* The Court cited, with approval, to *City of Las Cruces*. *Id.* at 1241–1242.

280. *Id.* at 1242.

281. *Id.*

282. *Town of Belleair*, 897 So. 2d at 1261.

283. *City of Winter Park*, 887 So. 2d at 1242.

ten cities considered some form of municipalization.[284] Of the eight who threatened or filed litigation to defend their purchase options, one exercised its option, six received new purchase options,[285] and in Belleair, voters defeated a plan to municipalize electric utility service.[286]

Aside from retaining purchase options and validating and exercising the municipal prerogative to citizens, these cities performed a service to all those local governments that possess franchise agreements. Clearly, investor-owned electric utilities can no longer flaunt a "take our deal" posture based upon a misreading of *Alachua County*. Perhaps of greater import is the judicial recognition and elucidation of criteria that can readily be used by any city (or county) to establish a valid franchise fee. Nor will there be any confusion over who holds these valuable rights-of-way in trust for the public—not corporate boards, but elected city and county officials.

Every case has a story. The story of these electric franchise purchase option/franchise fee cases is a saga in every sense of the word. It is a saga about the lengths to which one company went to thwart and block municipalization for the better part of sixty years. It is a saga of how cities have been mistreated and abused with accusations of socialism, threats, intimidation, denial of contract rights, misdirection, and fierce legal, political, and financial warfare. It is a saga of how this corporate conduct backfired and resulted in the validation of municipal authority and duties almost, but not quite, lost to history.

If ever there was an example of the necessity for elected home-rule governments in Florida, these cases are it. For without the personal courage of so many of these individual, elected city

284. These cities included Apopka, Belleair, Belle Isle, Casselberry, Dunedin, Edgewood, Longwood, Maitland, Oviedo, and Winter Park. Progress Energy, *Edgewood Finalizes Agreement with Progress Energy Florida,* http://www.progress-energy.com/custservice/flares/franchises/index.asp (accessed Feb. 6, 2005).

285. Apopka, Casselberry, Edgewood, Longwood, Maitland, and Oviedo received substantial cash payments as part of litigation settlements. Settle. Agreement, *City of Edgewood v. FPC*, No. CIO-01-928 (Fla. 9th Cir. 2005); Settle. Agreement, *City of Apopka v. FPC*, Nos. CIO-02-3751 & CIO-02-6129 (Fla. 9th Cir. 2004); Settle. Agreement, *City of Casselberry v. FPC*, No. 00-CA-1107-16-L (Fla. 18th Cir. 2003); Settle. Agreement, *City of Longwood v. FPC*, No. 01-CA-1279-16-G (Fla. 18th Cir. 2003); Settle. Agreement, *City of Oviedo v. FPC*, No. 02-CA-949-16-G (Fla. 18th Cir. 2002).

286. Pinellas County Supervisor of Elections, *Nov. 8, 2005, Belleair Referendum Election*, http://votepinellas.com/content.aspx?id=501 (accessed Mar. 20, 2006).

commissioners in staying the course, despite the financial and political risk, it is doubtful *Alachua County* would have been revisited. And it was a courage grounded in the knowledge of the very necessary historical link between recapture and fee—the basis for defending and preserving the municipal prerogative to serve.

APPENDIX

The 100-Year Timeline

1899	Purchase option law created.
1922	Orlando municipalizes.
1927	Insull gains control of FPC.
1932	Collapse of stock of original FPC.
1935	Adoption of PUHCA.
1943	Last municipalization in Florida.
1944	SEC approves four-company merger into new FPC.
1944	Policy to pay franchise fees to cities begun to prevent municipalizations and pay for the right to do business.
1945	Four cities begin attempts at municipalization: • Apopka • Clearwater • DeLand • Winter Park
1947	Cities lose two referenda in Clearwater and Winter Park; Apopka threatens to municipalize and receives higher franchise fees.
1947–1953	Pinellas County rate dispute leads to adoption of Dowda Bill giving FRPUC electric rate regulation. Company president testified to FRPUC that the franchise fees represented FPC's "cost of doing business."
1955	FPC Board adopts policy of

- two-percent fee for first ten years of franchise
- three-percent fee for second ten years of franchise
- four-percent fee for third ten years of franchise

Eustis attempts to municipalize.
FPC Board votes not to seek early renewals.

1959–1962 Winter Garden votes to municipalize. FPC begins three-year fight to stop city from issuing bonds to build its own plant by creating "lasting animosities."

1962 Franchise Fee Deal prepared w/City of St. Petersburg to give them two percent. History of franchise fees written internally.

1966–1968 Fight in Haines City over attempt to municipalize results in referendum over whether to spend money on feasibility report, which is defeated.

1968 Bartow, Gainesville, and US DOJ sue FPC over antitrust violations.

1969–1972 1970 "Standard" Franchise created, the so-called "6%" Franchise, and the company violates its own corporate policy by early renewing 51 of 104 franchises for thirty-year terms.

1972 Federal Power Commission Docket opened; twelve cities group sues FPC over bulk rates; FPC has to disgorge thousands of documents to Gainesville and the cities.

1974 Transmission Access Tariff T-1 created to settle Federal Power Commission suit and end the twelve cities war.

1976 *Plant City* case rendered, defining franchise "fees"

	as matter of contract, overturns FPSC direct pass through ruling.
1978	Supreme Court upholds FPSC ruling supporting direct pass through of franchise fees.
1984	Supreme Court strikes down as unconstitutional Lake Mary ordinance requiring undergrounding of electric lines. That same year, FPC stops including purchase options in franchises.
1989–1992	Palm Bay and North Port purchase options validated and exercised.
1992	EPact adopted by Congress.
1993	Oldsmar attempted municipalization in TECO's territory frightens FPC. Knowledge of EPact leads FPC to commission study to fight municipalization.
1994–1999	FPC implements study to prevent cities from municipalizing and remove the threat of the recapture provision. Creation of 1995 "New Standard" Franchise.
1999	*Alachua* decision rendered. Merger deal with CPL signed. Maitland five-year extension granted.
2000–2005	Casselberry, Winter Park, Longwood, Belleair, Edgewood, Apopka, and Oviedo litigate and arbitrate.
2001	*Casselberry* case validates purchase options.
2002	FPC changes negotiation strategy; Oviedo gets purchase option. Fifth District Court of Appeal upholds franchise fees; Second District Court of Appeal reaches opposite result. Casselberry arbitration completed.

2003	Winter Park arbitration completed; city votes overwhelming to municipalize on September 9. Belleair arbitration completed. Longwood and Casselberry settle; receive purchase options and substantial cash payments.
2004	Apopka settles; receives purchase option and substantial cash payment. Florida Supreme Court upholds Fifth District Court of Appeal, reverses Second District Court of Appeal, and validates franchise fee.
2005	Winter Park municipalizes June 1, 2005. Edgewood and Maitland reenter franchise agreements containing purchase options; both receive cash payments. Belleair referendum to be held November, 2005.