Government Contracting: Franchise Agreements

*Florida Power Corporation v. City of Winter Park,* 827 So. 2d 322 (Fla. Dist. App. 5th 2002)

An electric utility must continue to pay a franchise fee to a municipality when the franchise agreement between the electric utility and the municipality has expired and the electric utility continues to operate as if the agreement were still in effect.

**FACTS**

The City of Winter Park and Florida Power Corporation entered into a franchise agreement under which Florida Power paid the City a franchise fee of six percent of its gross receipts from the sale of electricity in the City. The agreement expired while the City and Florida Power were renegotiating the agreement. However, Florida Power retained possession of the City’s right-of-ways, continued operating as if the agreement were still in effect, and continued collecting the six percent from its customers. However, Florida Power refused to pay the franchise fee to the City.

The City sought an injunction to require Florida Power to pay the franchise fee as a holdover franchisee. The circuit court granted the injunction, effectively continuing the parties’ relationship under the expired agreement for the holdover period. Florida Power appealed to the Fifth District Court of Appeal, which affirmed the circuit court’s decision.

**ANALYSIS**

Florida Power based its refusal to pay the franchise fee after the agreement had expired on a 1999 Florida Supreme Court case, *Alachua County v. State,* 737 So. 2d 1065 (Fla. 1999). In *Alachua,* the Court held that a unilateral fee charged for the use of public property was an unconstitutional tax because the fee charged was unrelated to the cost of maintaining the public property.
Previously, Florida Power had argued successfully this same position in a case with substantially identical facts. *Fla. Power Corp. v. Town of Belleair*, 830 So. 2d 852 (Fla. Dist. App. 2d 2002). In that case, the Second District Court of Appeal held that, because the bargained-for franchise agreement had expired, the franchise fee was a unilateral fee charged by the town that was not proven to relate to maintaining the right-of-way property. *Id.* at 854. The Second District relied on *Alachua* in reaching its decision. *Id.*

In direct conflict with the Second District, the Fifth District distinguished *City of Winter Park* from *Alachua*. In *Alachua*, the county was attempting to generate new revenue through a county ordinance that imposed a fee on electric utilities for the privilege of using the county’s property to deliver electrical service to consumers. The fee in *Alachua* was imposed by ordinance and was not the result of bargaining between the electric utility and the municipality, as was the case in *City of Winter Park*. In dicta, the Fifth District indicated that the ruling in *Alachua* would have been different if the fee had been based on a previously negotiated agreement, instead of being unilaterally imposed by ordinance.

The Fifth District continued by analogizing the relationship between Florida Power and the City to that of a landlord–tenant relationship. Once the agreement expired, Florida Power became a holdover tenant subject to a claim for double rent. Absent eviction, a demand for double rent, or other action by the landlord, a holdover tenant becomes a tenant at sufferance subject to the terms of the original agreement. To continue providing electrical service to its citizens, the City had no option but to consider Florida Power a tenant at sufferance after the expiration of the agreement. According to the Fifth District, this resulted in Florida Power being liable for the original six percent franchise fee. The Fifth District, in its decision, certified conflict with *Town of Belleair*.

The dissenting opinion in *City of Winter Park* stated that the majority should have followed *Alachua* and found the franchise fee to be an unconstitutional, unilateral tax once the agreement with Florida Power had expired.

**SIGNIFICANCE**

This case is significant because it results in a split between the Fifth District and the Second District in applying *Alachua*
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with regard to fees charged to electrical utilities once the underlying franchise agreement has expired. Practitioners involved in renegotiating contracts between electrical utilities and municipalities should be aware of these differing treatments of the franchise fees if the agreement expires during the period of renegotiation. Practitioners should consider a franchise-fee-continuation agreement if it is likely the franchise agreement will expire before it is renegotiated successfully.

RESEARCH REFERENCES


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**Government Contracting: Indemnification**


A municipality is entitled to indemnification from a sponsor of a special event for injury claims arising from the municipality’s own negligence when the indemnification ordinance does not require an executed indemnification agreement and the ordinance does not limit the scope of the indemnification.

**FACTS**

The Pensacola Sertoma Club, Incorporated, (Sertoma) requested a permit from the City of Pensacola to hold a Fourth of July parade and fireworks display. The City’s approval of the special event was in the form of a letter to Sertoma providing that the approval was subject to a city ordinance requiring applicants for special-event permits to “indemnify and hold harmless the city . . . for any and all claims caused by or arising out of the activities permitted.” *Ray*, 809 So. 2d at 81. Sertoma named the City as an additional insured on an insurance policy purchased for the event.

The plaintiff, Lois Ray, attended the event and injured herself by falling over a support line that ran from a tree to a stake in the ground. All parties agreed that the City’s negligence,
and not Sertoma’s, caused Ray’s injuries. Ray sued the City, and as part of a settlement agreement received an assignment of the City’s right to indemnification from Sertoma for the amounts the City paid to settle Ray’s claim.

Ray sued Sertoma to enforce the indemnity ordinance, and the circuit court granted Sertoma’s motion for summary judgment on the basis that the City’s right to indemnity did not extend to injuries caused by its own negligence. Ray appealed to the First District Court of Appeal, which reversed the circuit court’s decision and interpreted the ordinance as providing indemnity even for claims arising because of the City’s own negligence.

ANALYSIS

Sertoma argued that its agreement with the City, as evidenced by the letter of approval, was a contract and, based on case law, the City could not seek indemnification for its own negligence without express language providing for such indemnity. The First District found this argument unpersuasive because the indemnity language was found in an ordinance, and not in a contract.

The court analyzed agreement as a statutory-interpretation issue, and noted that the City could have required an executed indemnification agreement for special-event permits, but chose not to. The City also could have limited the scope of the indemnification, but again, chose not to. The court examined the City’s sign ordinance that called for an executed indemnification agreement and a limitation of the scope of indemnity, to emphasize that the special-events ordinance was specifically drafted not to require an indemnification agreement and not to limit the scope of the indemnification.

SIGNIFICANCE

The issue in Ray was whether a city ordinance provided indemnification to the City by the sponsor of a special event for injury claims arising from the City’s own negligence. The First District held that the City was indemnified based primarily on the broad language of the ordinance. Practitioners should be aware of this case when drafting indemnification ordinances to avoid limiting the municipality’s indemnification.
2003] RESEARCH REFERENCES


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