IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,344

ALACHUA COUNTY, FLORIDA,
a political subdivision of
the State of Florida,

Appellant,

vs.

THE STATE OF FLORIDA,
CITY OF GAINESVILLE, FLORIDA,
a municipal corporation,
FLORIDA POWER & LIGHT CO.,
a Florida corporation, and
UNIVERSITY OF FLORIDA,

Appellees.
_____/

INITIAL BRIEF OF AMICUS CURIAE CITY OF ALTAMONTE SPRINGS, FLORIDA

On Appeal From the Eighth Judicial Circuit
In and For Alachua County, Florida
Case Nos. 97-3088, 97-3518, 97-4368, 97-4715

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STATEMENT OF THE CASE AND FACTS

Amicus, CITY OF ALTAMONTE SPRINGS, FLORIDA, adopts the Statement of the Case and the Facts contained in the Initial Brief filed by Appellant, Alachua County, in this appeal.

SUMMARY OF THE ARGUMENT

Cities and Counties possess Constitutional Home Rule authority to charge utility companies fees for the extraordinary use and occupation of the public rights-of-way for the companies' private economic gain. Except where clearly preempted by the Legislature, local government has the same proprietary power over its property as enjoyed by the sovereign.

No law preempts Cities and Counties from charging these fees. Several State and Federal statutes recognize this authority. Not as to electric companies, but as to certain utilities, there are laws which establish a maximum fee that may be charged.

These fees are generally referred to as "franchise fees". Franchises are generally voluntarily negotiated between the utility company and local government. The fees are in the nature of rental for the special use of the local governments' property which Cities and Counties purchase at costs of millions of dollars each year.

These fees are proprietary and not regulatory. They are intended to derive a fair return on local governments' investment in their real property. Historically, these fees have been based on a percentage of the revenues generated within the corporate limits of a City, or, in the case of a County, generated outside City limits within the unincorporated boundaries of the County. This historic practice has established what a fair return would be for the use and occupancy of the rights-of-way. A lease fee based on income is a generally accepted type of rent.

Where a utility refuses to negotiate a franchise, but continues to use and occupy the public rights-of-way for private gain, local government is within its Constitutional

authority to charge a "privilege fee". Lack of agreement on the part of the utility does not convert these rental fees into a tax. Neither does applying these rental fees to meet general revenue needs convert them into a tax.

Each of the utility companies, themselves, have the power of eminent domain. They have available to them the alternative of acquiring easements across private property. This is an economic choice for the utilities. At any time when the cost of relocating facilities or building new facilities on private property parallel to the public rights-of-way becomes more economically attractive to the utilities than paying local government franchise fees, there is nothing stopping the utilities from doing so.

A County's authority to charge the fees is limited to the unincorporated areas of the County, and does not extend to within municipal boundaries. In this respect, the City takes issue with Alachua County's ordinance. A County's legal authority to charge the fees within municipal boundaries is preempted by the Legislature. Unlike settled caselaw and precedent whereby utilities pay local government franchise fees for use and occupation of the public rights-of-way, no precedent exists for counties to charge cities franchise or privilege fees. Nor is there authority or precedent for Counties to charge franchise fees for utilities to serve simply within City limits.

The statewide implications of this appeal on Cities and Counties reveal an issue of great public interest. Affirmance of the Trial Court's decision has the potential for serious adverse consequences on local government's continued ability to provide essential governmental services.

ARGUMENT

I. LOCAL GOVERNMENT POSSESSES HOME RULE AUTHORITY TO CHARGE FEES FOR THE USE OF PUBLIC RIGHTS-OF-WAY

Article VIII, Section 2(b), of the Florida Constitution vests such governmental, corporate and proprietary powers in municipalities as to enable them to perform municipal functions and to render municipal services. The intent of this constitutional provision was to give municipalities the broadest powers possible, and to severely limit a court's ability to preempt home rule powers through interpretation of unexpressed legislative intent. Section 166.021, Florida Statutes, provides as follows:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means **any activity or power which may be exercised by the state** or its political subdivisions.
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is further the intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited...(emphasis added)

This Home Rule power may be exercised for any municipal purpose "except as otherwise provided by law". Municipalities possess the same powers as the State in matters

pertaining to their government, except when such powers are limited by the Legislature.

There is no question that the State has proprietary power over the extraordinary use of its property for private gain. Likewise, except where clearly preempted by the Legislature, municipalities possess proprietary powers over lands which they own. Municipalities' authority to condition the use by utility companies of the public rights-of-way on grant of authorization from the City and payment of fees derives from the Constitution.

No law preempts municipalities from charging fees as consideration for the occupation of the rights-of-way by utilities. Numerous state and federal statutes acknowledge the authority of municipalities to charge such fees. Certain laws prescribe the maximum rate that may be charged depending upon the type of utility involved.

For example, Section 364.0361, Florida Statutes, recognizes local government's authority to require franchises of telecommunications companies and to require the payment of fees as compensation for the use of the rights-of-way:

> **364.0361 Local government authority; nondiscriminatory exercise.-** A local government shall treat each telecommunications company in a nondiscriminatory manner **when exercising its authority to grant franchises to a telecommunications company** or to **otherwise** establish conditions or **compensation for the use of rights-of-way or other public property** by a telecommunications company. (emphasis added)

It is clear that the above is not a grant of authority, but a qualification, recognition and confirmation of authority.

Sections 337.401(1) and (2), Florida Statutes, also, require electric, gas, telephone, water and sewer utilities to obtain a permit from the local government prior to commencing

work in the rights-of-way. This relates to regulatory police powers of local government over the rights-of-way:

> **337.401 Use of right-of-way for utilities subject to regulation; permit; fees.-**
>
> (1) The department and local governmental entities, referred to in ss. 337.401-337.404 as the "authority", that shall have jurisdiction and control of public roads or publicly owned rail corridors are authorized to prescribe and enforce reasonable rules and regulations with reference to the placing and maintaining along, across, or on any road or publicly owned rail corridors under their respective jurisdictions any electric transmission, telephone, or telegraph lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures hereinafter referred to as the "utility".
>
> (2) The authority may grant to any person who is a resident of this state, or to any corporation which is organized under the laws of this state or licensed to do business within this state, the use of a right-of-way for the utility in accordance with such rules and regulations as the authority may adopt. No utility shall be installed, located, or relocated unless authorized by written permit issued by the authority. The permit shall require the permitholder to be responsible for any damage resulting from issuance of such permit. The authority may initiate injunctive proceedings as provided in s. 120.69 to enforce provisions of this subsection or any rule or order issued or entered into pursuant hereto.

Sections 337.401(3) and (4), Florida Statutes, acknowledge municipalities' additional proprietary powers over the rights-of-way, and limit the exercise thereof by prescribing a cap on the maximum franchise fee to be charged to telecommunications companies for occupancy of the rights-of-way:

> (3) **If any municipality requires any telecommunications company to pay a fee or other consideration as a condition for granting permission to occupy municipal streets and rights-of-way for poles, wires, and other fixtures, such fee or consideration may not exceed 1 percent of the gross receipts on recurring local service revenues** for services provided within the corporate limits of the municipality by such telecommunications company. Included within such 1-percent maximum fee or consideration are all taxes, licenses, fees, in-kind contributions accepted pursuant to subsection (5),and other impositions except ad valorem taxes and amounts for assessments for special benefits, such as sidewalks, street pavings, and similar improvements, and occupational license taxes levied or imposed by a municipality upon the telecommunications company. This section shall not impair any **franchise** in existence on July 1, 1985.(emphasis added)

Subsection (3) above refers to local telephone service. This section requires that regulatory permit fees be waived or subtracted from the proprietary franchise fee. Long distance providers are dealt with differently, as provided in Subsection (4) below:

> (4) A municipality may by ordinance enter into an agreement with any person providing telecommunication services defined in 203.012(7) as a condition for granting permission to occupy any city street, alley, viaduct, elevated roadway, bridge, or other public way. The agreement shall permit the telecommunication service provider to construct, operate, maintain, repair, or replace a telecommunications route within a municipal right-of-way. The agreement shall provide for a fee or other consideration payable annually based on actual linear feet of any cable, fiber optic, or other pathway that makes physical use of the municipal right-of-way. In no event shall the fee or other consideration be less than $500 per lineal mile of any cable, fiber optic, or other pathway that makes physical use of the municipal right-of-way. Any fee or other consideration imposed by this subsection in excess of $500 shall be applied in a nondiscriminatory manner and shall not exceed the sum of:

(a) Costs directly related to the inconvenience or impairment solely caused by the disturbance of the municipal right-of-way; and

(b) The reasonable cost of the regulatory activity of the municipality.

(c) The proportionate share of cost of land for such street, alley, or other public way attributable to utilization of the right-of-way by a telecommunication service provider. . .

Chapter 366, Florida Statutes, relating to electric and gas utilities, further, provides:

366.11 Certain exemptions.-

(2) Nothing herein shall restrict the **police power** of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or **affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise**.(emphasis added)

On the Federal level, the Telecommunications Act of 1996 at Section 253 provides:

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.-

Nothing in this section affects the authority or a State or local government to manage the public rights-of-way or to **require fair and reasonable compensation from telecommunications providers**, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, **if the compensation required is publicly disclosed by such government**.(emphasis added) 47 U.S.C.,Section 253.

Section 622 of the Federal Communications Act of 1934 provides:

Section 622[47 U.S.C. 542] FRANCHISE FEES.

(a) Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

> (b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services....

Charter counties, such as Alachua County, derive similar Home Rule authority from Article VIII, Section 1(g) of the Florida Constitution("all powers of local government not inconsistent with general law, or with special law approved by vote of the electors"). Reference made herein to the authority of the City or municipalities is meant to be read in the same context for counties, except, as will be explained later, that a county's authority to charge a street fee is not coextensive with that of the municipality within the actual corporate limits of a municipality.

A. LOCAL GOVERNMENT HAS BOTH PROPRIETARY AND REGULATORY POWERS OVER STREETS

One example which defines clearly the proprietary power which local government has over its rights-of-way is the ability which local government shares with the Department of Transportation to condemn an entire parcel of property for right-of-way when to do so would be equal to or less expensive than the costs of acquiring only a portion of the property and paying severance damages. Section 337.27(2), Florida Statutes, specifically made applicable to municipalities by Section 166.401(2), Florida Statutes, and to counties by Section 127.01(1)(b), Florida Statutes, provides as follows:

> **337.27 Exercise of power of eminent domain by department; procedure; title; cost.-**

> (2) In the acquisition of lands and property, the department may acquire an entire lot, block, or tract of land if, by doing so, the acquisition costs to the department will be equal to or less than the cost of acquiring a portion of the property. This subsection shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the state of property acquisition is a public purpose and that, without this limitation, the viability of many public projects will be threatened.

This statute is commonly known as the "Fortune Federal" statute, referring to this Court's decision upholding the constitutionality of the statute in Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267(1988). Thus, the department and local government are permitted to acquire more property than what is necessary to complete a right-of-way project.

What becomes of the balance of the property after the road project is completed? One argument raised in the Fortune Federal case in an attempt to defeat the statute was that, if the property were to be ultimately sold to a private individual, private property would have been taken for a private purpose, in contravention of Article X, Section 6(a), of the Florida Constitution. This Court firmly rejected that argument, and held that future sale of the property to a private buyer is not prohibited. Id. at 1270.

No restrictions are placed on the profitability to the state or a local government arising from the sale to a private buyer. It goes without question that this exercise of authority over the property by local government is by virtue of its proprietary powers.

The United States Supreme Court recognized a State's proprietary powers over its property in the case of United States Postal Service v. Council of Greenburgh Civic

Associations, 453 U.S. 114, 69 L.Ed. 2d 517,530, 101 S.Ct. 2676(1981), wherein it stated:

> [T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

And, truly, the Florida Legislature has recognized the proprietary powers of municipalities over public rights-of-way:

> **337.29 Vesting of title to roads; liability for torts.-**
>
> (3) . . .Except as otherwise provided by law, a municipality shall have the same governmental, corporate, and ***proprietary powers with relation to any public road or right-of-way within the municipality*** which has been transferred to another governmental entity pursuant to s. 335.04 that ***the municipality has with relation to other public roads and rights-of-way within the municipality***. (emphasis added)

Municipalities may require payment of compensation in the nature of rental fees, pursuant to their proprietary powers over public property, for the special privilege of occupying their roads for private gain.

1. A FRANCHISE TO USE THE STREETS IS DIFFERENT FROM A PERMIT TO EXCAVATE IN STREETS

There is a significant difference between a franchise to be entitled to permanently displace and occupy space in, over or under public streets and a permit to allow the company to conduct individual works of excavation or construction in the streets. The former issues under the government's proprietary powers, while the later issues under regulatory power. The power to grant a franchise is not a regulatory or police power.

A franchise is a condition precedent to obtaining a permit for the construction

activities. Franchises have been defined as "special privileges granted by the government to particular individuals or companies to be exploited for private profits." These special privileges do not belong to the citizens of the country generally by common right. McQuillin, Municipal Corporations, Sections 34.01-34.02(3rd Ed. 1995). A franchise confers the right to make extraordinary use of the public rights-of-way for private gain.

2. FRANCHISE FEES ARE IN THE NATURE OF A RENTAL OF THE RIGHTS-OF-WAY

It is by virtue of home rule proprietary powers that municipalities have, over the last century, historically charged franchise fees for the use of the rights-of-way. Municipalities, and certainly counties, as well, spend literally millions of dollars each year purchasing fee simple title to property for rights-of-way.

A franchise fee is in the nature of a rental or lease fee. It is recovery of a fair return on use of the public property. This franchise fee is not limited to regulatory costs, as are regulatory permit fees. The highest courts of this land have upheld local government's proprietary authority to charge these rental fees for use of the streets. City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 13 S.Ct. 485, 37 L. Ed. 380(1892)(city has the right to charge a fee for privilege of using streets for telegraph poles; clearly, fee imposed is not a tax, but a charge for the use of property belonging to the city, that which may properly be called "rental"; Court not to assume fee is excessive); Western Union Telegraph Co. v. City of Richmond, 224 U.S. 160, 56 L. Ed. 710(1911)(city ordinance imposing rental fee on telegraph company's use of the streets upheld); City of Plant City v. Mayo, 337 So.2d 966(Fla. 1976)(6% electric franchise fee is not a tax, but rather

consideration for use of municipal rights-of-way); City of Pensacola v. Southern Bell Telephone Co., 37 So. 820(Fla. 1905)(municipalities have power and duty of regulating use of their streets, may impose reasonable charge in the nature of a rental for occupation of streets, and may impose additional charge in enforcement of police power regulation); City of Dallas, Texas, et.al. v. Federal Communications Commission, 118 F.3d 393(5th Cir. 1997)(franchise fees are not a tax but a form of rent, the price paid to rent use of public right-of-ways); Telestat Cablevision, Inc. v. City of Riviera Beach, Fla., 773 F.Supp. 383(S.D. Fla 1991)(city clearly within its power in charging franchise fees for the commercial use of the public rights-of-way; 5% of gross revenue fee approaches reasonable market value of the rental of City's rights-of-way when compared with franchise fees for other utilities in county); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 594-595(W.D.Pa. 1987)(regardless of a city's possessory interest in the streets, a city is justified in conditioning commercial enterprise's use of streets upon payment of a rental/franchise fee); Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So.2d 1159(Fla. 1st D.C.A. 1992), rev. den., 613 So. 2d 1(Fla. 1992)(6 % privilege fee charged for access to airport roads and ramps is a user fee and not a tax). See also, Commonwealth Edison Co. et. al. v. Montana et. al., 453 U.S. 609, 101 S.Ct. 2946, 69 L. Ed. 884, 897(1981)(upholding "user" fees in the nature of rent, not a tax, charged by the State based upon "proprietary" interest in its public property).

3. CONSTRUCTION ACTIVITIES IN THE RIGHTS-OF-WAY ALSO REQUIRE REGULATORY PERMITS UNDER POLICE POWER

The following is a fair description of the interface between the right conferred by a

franchise and a permit to construct in the rights-of-way:

> A permit to excavate in streets is to be distinguished from a grant of the right to use the streets. The former is a mere police regulation that may be required after the public service company has obtained, either from the state or the municipality, the right---whether it be called a license, franchise or contract---to use the streets. The grant of a franchise to use streets does not preclude the municipality from requiring application for a permit to excavate the streets to lay pipes or erect poles or the like, since requiring such a permit and the payment of a reasonable fee is a proper and reasonable exercise of the police power, and does not impair the franchise right of a company to use the streets. McQuillin, Municipal Corporations, Section 34.76(3rd Ed. 1995).

Receipt of a franchise to occupy the streets does not exempt the utility company from observing police power regulations governing construction activities in the streets. The utility must make permit application wherein it notifies the local government which streets are to be disturbed and the manner of disturbance. There will generally be a modest permit fee for reimbursement of review costs.

Police power regulations govern a number of issues, such as how deep the lines and cables must be buried under the street pavement, how far apart the conduits must be from those of the several other utilities located within the crowded space beneath and above the streets, location of other utilities, bonding and indemnification.

B. STREET FRANCHISE FEES BASED ON A PERCENTAGE OF REVENUES ARE VALID

A revenue-based franchise or street fee is the most prevalent measure of compensation for use of the rights-of-way. This applies not solely as to the provision of electric service, which is the subject of the Alachua County ordinance, but also to cable television, telephone, gas, water and sewer.

The Courts have upheld a percentage of the revenues basis for franchise fees against the argument by the utilities that the fee is tantamount to a tax. In the case of Santa Rosa County v. Gulf Power Company et.al., 635 So.2d 96(Fla. 1st D.C.A. 1994), telephone and electric utilities raised the argument that a fee based on a percentage of the gross revenues constitutes an illegal "tax" as opposed to a legal franchise fee for the use of the public rights-of-way. It was the utilities' position that fees based on a percentage of gross revenues bore no relation to the cost of regulation or to the reasonable rental value for the use of the right-of-way, and were, therefore, taxes. The Court rejected the utilities' argument. Citing the Florida Supreme Court decision in City of Plant City v. Mayo, 337 So.2d 966(Fla. 1976), the Court held that the franchise fees were not taxes. The Court found that they were charges bargained for in exchange for specific property rights from the local government.

Generally, street franchise fees are paid annually, and are based upon a percentage of revenues generated by the utility within City limits, or, in the case of a County, those revenues generated outside of City limits. The fees vary among the different utilities, but in each case they are uniform as to the specific utility.

For example, electric utilities [generally] pay a 6% franchise fee to municipalities. No law sets a cap on electric franchise fees; however, this rate has remained fairly constant for at least the last 30 years.

Cable television companies [generally] pay a franchise fee of 5%. This rate is capped by Section 622 of the Federal Communications Act of 1934, 47 U.S.C. Section 542.

Telephone and telecommunications companies [generally] pay a franchise fee of 1%. This rate is capped by Section 337.401(3), Florida Statutes, Supra.

Natural gas companies [generally] pay a franchise fee of 6%. As with electricity, there is no law limiting the maximum rate; however, it has remained constant for decades.

Establishing a franchise or street fee as a percentage of the revenues is a good market based approach. Rent is based upon the economic value of the property rights conferred on the utility.

Historic practice has established what a fair return would be for the use and occupancy of the rights-of-way based on a percentage of revenues. In appraisal parlance, this would constitute "comparables" upon which fair market value would be determined. A lease fee based on a set fee plus a percentage of the income derived from the business is one of a variety of different accepted types of rent. Appraisal Institute, The Appraisal of Real Estate, Rent Analysis, page 435(Tenth Edition). The State of Florida, also, leases sovereignty submerged lands for marinas and other purposes using a basis of either 7 % of the revenues or the appraised market rental value of the riparian upland property. Fla. Admin. Code R. 18-21.011.

ALACHUA COUNTY's ordinance imposes a street[privilege] fee of 3%. This rate is lower than the historic rate of 6% applicable to electric utilities. The Trial Court invalidated the fee, in part, holding that the fee was not related to the reasonable rental value of the land occupied. Perhaps the rate in the instant case is somewhat lower than that typically charged, but this ought not invalidate the fee. A percentage of the revenues fee fairly relates to the fair market value of a street franchise to occupy the streets in an extraordinary manner for private gain.

C. APPLYING FRANCHISE FEE PROCEEDS TO MEET GENERAL REVENUE NEEDS DOES NOT CONVERT THEM TO A TAX

Although the Public Service Commission has come into operation and assumed jurisdiction over quality of service, utility rates and geographic service areas, franchise fees continue to be paid to local government, generally itemized as a pass through on the customer's bill, as consideration for rental of the streets. Likewise, should a utility acquire right-of-way from a private party, the purchase price plus costs of condemnation would be passed on to the customers through the rate base. Local government's costs of acquiring rights-of-way continue to mount in alarming proportions. The fair market value of the property continues to, correspondingly, increase.

The franchise fees, when paid, are deposited into the local government's general revenue fund together with a variety of other non-tax revenues such as filing fees, zoning fees, fines and forfeitures, revenues derived from the sale of municipal property, and easements and leases of municipal property, including leases of water towers for private telecommunications towers and antennas.

All of these fees, together with ad valorem taxes, are used to support police, fire and other essential governmental services. That the street rental fees are deposited into general revenue and that they support essential services, does not mean that they are taxes any more than the money paid as monthly rent for a concession stand at a public park or civic center would be a tax..

D. THE AUTHORITY TO CHARGE A FEE IS NOT DEPENDENT UPON THE VOLUNTARY AGREEMENT OF THE UTILITY

It goes without saying, the panoply of caselaw cited above recognizing and upholding local government's authority to charge fees for utility companies' extraordinary use and occupation of the public rights-of-way was generated as a result of utility challenges to municipal decisions to charge a rental fee for use of the streets. In some cases, a franchise was negotiated. However, in many others, agreement was not reached, and the utility faced a decision: pay the fee or leave public property

The courts have long and consistently upheld the authority of government to charge rental fees for franchises or the use of public property. In fact, decisions have more than hinted at a public interest based duty to do so:

> A valuable franchise, to use public property the street, for corporate profit, is about to be granted. It is not illegal or unreasonable that the public, or the city which represents it, should have a consideration for the privilege that it confers. If it were a right of passage over private property, there would be no question about it, and the right could not be got in any other way. We see no reason why the public interest should not be promoted by requiring special privileges in the public property to be paid in the same way. . .
>
> This Court reads the *Allegheny City v. Railway* case to suggest two principal

> justifications for permitting a local governmental entity to rent or franchise the public rights-of-way: the need for the entity, first, to operate as a proprietor when dealing with private commercial enterprises and, second, and interrelated, to protect the public interest. Surely, it would be unreasonable to require a city to provide public property at a nominal rental fee to a business which intends to directly utilize this land for the realization of profits. The mere happenstance that a commercial enterprise operates on public properties, rather than private properties, should not provide an exemption for costs which accompany the doing of business. Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 594-595(W.D.Pa. 1987).

Is this fee dependent upon the voluntary agreement of the utility? No. The authority to charge the rental fee derives from Constitutional Home Rule powers. Local governments' proprietary powers do not derive from contract.

Nor do the fees convert into taxes because the utility refuses to negotiate. Do the utilities have the option of not occupying the public roads? Yes, for the most part, they each possess the power of eminent domain. They each have available to them the alternative of acquiring easements across private property.

This is an economic choice for the utilities. At any time when the cost of relocating facilities or building new facilities on private property parallel to the public rights-of-way becomes more economically attractive to the utilities than paying local government franchise fees, there is nothing stopping the utilities from doing so.

Indeed, were the Court to deny local government's proprietary powers over their property, this forced subsidy would, in effect, exact a tax on the residents and a taking of public and private property without compensation. Maximizing profits of a private company does not serve a public purpose.

Yet, the Lower Court's holding that the fees were a tax because the utilities had no alternative but to occupy the rights-of-way and pay the fee[1], when taken to its logical and not so remote conclusion, may be interpreted to deny local government the right to impose the fees unless the utility agrees to them. This is an invitation for utilities to stonewall local government in franchise discussions. In point of fact, the wave has just begun. Other utilities have recently stepped up to bat, refusing to negotiate a franchise, even refusing the tender of a franchise from local government on terms identical to those applicable to similar utilities, and asserting a right to continue to place their facilities in the rights-of-way.

Franchise ordinances generally contain a provision requiring the utility to "accept" the franchise within a given period of time, usually thirty(30) days. This mechanism sets up the safeguard of a contract for enforcement. But where a utility simply refused to accept the franchise, the Georgia Supreme Court fashioned a solution to the problem in much the same vein as does Alachua County's "privilege fee" ordinance:

> The third question we posed in granting certiorari was whether an agreement between the unified government and the EMC was necessary in order for the unified government to collect a franchise fee from the EMC. Adoption of "an ordinance conditioning the future grant of the requisite street franchise upon [the EMC's} payment of a reasonable franchise fee" will obligate the EMC "to accept the grant of a street franchise on that condition if it intends to continue to use and occupy the [unified government's] streets for the purpose of providing

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[1]Citing State v. City of Port Orange, 650 So.2d 1(Fla. 1994). In Port Orange, the fee was charged to all owners of developed property in the City. The owners did not have the option of avoiding the fee, and the fee was not a rental charge for extraordinary use and economic gain from public property. Contrasted with that case, utility companies derive special economic benefit from occupation of local government property in a manner not shared by the citizens. Moreover, the utilities have the option of relocating their facilities out of the rights-of-way to avoid paying franchise fees.

> electricity to its customers who live [within the boundaries of the unified government]." City of Calhoun v. N. Ga. EMC, supra, 264 Ga. at 210, 443 S.E. 2d 469.
>
> Upon adoption of such an ordinance, [the EMC's] continued use and occupancy of the [unified government's] street for said purpose [of providing electricity to its customers who live within the boundaries of the unified government] will render [the EMC] liable for the payment of such fees and entitle the [unified government] to enforce compliance with such ordinance by appropriate proceeding at law or in equity. Id. Athens-Clarke County v. Walton Elec., 454 S.E. 2d 510(Ga. 1995).

In what the CITY considers to be a fair alternative approach to the issue of voluntariness, by recently adopted ordinance relating to use of the rights-of-way by telecommunications companies, all existing lines and facilities in the rights-of-way are grandfathered on the effective the date of the ordinance. The utilities need only obtain a franchise and pay a franchise fee in the event they, after the effective date of the ordinance, construct extensions or place additional facilities in the rights-of-way.

II. A COUNTY'S AUTHORITY TO CHARGE THE FEES IS LIMITED TO THE UNINCORPORATED AREAS AND DOES NOT EXTEND TO WITHIN MUNICIPAL BOUNDARIES

The CITY takes issue with one element of the County's ordinance, which issue this Court may, but possibly may not, find relevant to the bond validation matter presented. Should this issue be entertained by the Court, the CITY respectfully suggests the Court weigh historic precedent and the potential for serious disruption of municipal government operations, not only in the CITY, but also throughout the entire state.

As background, the CITY operates a water, wastewater and reclaimed water system to serve the needs of its residents within the incorporated limits of the City. The CITY's system, also, extends beyond the City limits, and, to a limited extent, serves customers within unincorporated Seminole County. There are approximately five(5) County rights-of-way that traverse portions of the City. The CITY's utility lines are located in virtually every right-of-way within the CITY, including the few "intraCity" County rights-of-way. In order to extend service into the unincorporated areas of Seminole County, City utility lines also occupy limited areas within County rights-of-way outside of the City. This scenario will commonly be found throughout the State of Florida.

The potential import of this Court's decision in this Alachua County bond validation proceeding on the CITY utility operations is that a decision with respect to the electric utility will likely carry over to water, sewer, cable and other utilities. Alachua County has chosen to include municipal utilities within the gambit of its privilege fee ordinance. Thus, municipalities which have utility lines within their own City limits, but which may transverse the few "**intraCity** County rights-of-way", would be obligated to pay the Counties a percentage based upon **all** the revenues derived from operation of the municipal utilities.

No precedent exists for this street charge by a County against a City. Unlike settled caselaw and precedent whereby private utilities pay local government franchise fees for use and occupation of the public rights-of-way, no such precedent exists for counties to charge cities franchise fees.

The overlap and confusion that would arise with respect to franchises issued to private utilities would be significant. As an example, cities grant franchises to cable

television companies for use and occupation of the cities' rights-of-way. However, since county rights-of-way also transverse portions of cities, ALACHUA COUNTY's approach would require the cable operator to obtain franchises from both the City and the County, simply in order to serve the customers within the City limits.

Division of the franchise fees would also be problematic. Heretofore, cable companies have obtained franchises from the counties for unincorporated areas only, and they have paid franchise fees to the counties based on subscribers within the unincorporated areas. There has not been any overlap with subscribers or fees paid to the cities. ALACHUA COUNTY's approach would require segregation of subscribers within city limits, based on whether they front either a City or a County right-of-way.

The only workable, reasonable and logical approach to franchise fees, or privilege fees, as the case might be, is for the County to impose them, singularly, in the unincorporated areas **outside of city limits**. And, relative to a county charging a city franchise fees, perhaps where a city is providing service to residents in the unincorporated areas and occupying county rights-of-way **outside of city limits**, arguably, it might not be unreasonable for the City to pay a fee to the county based on a percentage of revenues generated **outside of city limits,** in the unincorporated areas of the County. Clearly, the concept, as espoused by ALACHUA COUNTY, of a City paying the County a percentage of ***all*** utility revenues, including revenues generated by the City in providing utility service to its own residents within the City limits, is unreasonable, unworkable and illogical.

Were this not reason enough, the Legislature clearly has **preempted** counties' authority to grant franchises, and, thus, to charge franchise or street fees, within the

corporate limits of any municipality:

> **125.42 Water, sewer, gas, power, telephone, other utility, and television lines along county roads and highways.-**
>
> (1) The board of county commissioners, ***with respect to property located without the corporate limits of any municipality***, is authorized to grant a license to any person or private corporation to construct, maintain, repair, operate, and remove lines for the transmission of water, sewage, gas, power, telephone, other public utilities, and television under, on, over, across and along any county highway or any public road or highway acquired by the county or public by purchase, gift, devise, dedication, or prescription. However, the board of county commissioners shall include in any instrument granting such license adequate provisions: (emphasis added).

A County may only exercise its franchise authority in the unincorporated area of the County **outside of city limits**. A County may not exercise franchise authority within City boundaries. Therefore, it is clear that ALACHUA COUNTY may not impose the privilege fee within the corporate limits of any municipality.

CONCLUSION

Utilities in the case below convinced the Lower Court to take off its judicial hat and don the hat of the legislative branch to make new law. The policy decision enunciated by the Lower Court in this case is misplaced and inappropriate. Clearly, the Legislature could take such action, but the judicial branch should not, and cannot.

A reversal of the Lower Court's Final Summary Judgment is mandated by clear legal Constitutional, statutory and caselaw authority and settled precedent. An affirmance of the trial court could cause financial chaos within local governments statewide. The County may charge the fees only for those rights-of-way located outside of the corporate limits of any municipality. In light of the foregoing, the undersigned amicus curiae respectfully requests that this Court rule accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **all parties on the attached service list**, this 17, day of July, 1998.

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