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,
et al.

Appellee,
and

THE CITY OF GAINESVILLE;
THE UNIVERSITY OF FLORIDA;
SANTA FE COMMUNITY COLLEGE;
FLORIDA POWER & LIGHT CO.;
FLORIDA POWER CORP.; FLORIDA
ELECTRIC COOPERATIVES ASSOC.,
INC.; THE TOWN OF MICANOPY;
THE CITY OF ALACHUA; THE CITY
OF WALDO; HOWARD J. SCHARPS,

Intervenors.
_____/

BRIEF OF AMICI CURIAE, FLORIDA ASSOCIATION OF COUNTIES AND FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC.

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

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STATEMENT OF CASE AND FACTS

Amici Curiae adopts the Statement of Case and Facts provided in the Initial Brief of Appellant, Alachua County, Florida.

SUMMARY OF THE ARGUMENT

The Alachua County Privilege Fee (the "Privilege Fee") is not a novel charge in Florida and its imposition presents no new legal issues. Clear Florida precedent exists for the imposition of charges in the nature of a rental for a privileged use of public property. See City of Pensacola v. Southern Bell Telephone Company, 37 So. 820 (Fla. 1905); Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 1 (Fla. 1992).

The Privilege Fee is not a tax which requires general law authorization. The Privilege Fee is the functional equivalent of a franchise fee because it is imposed for the same purposes, in the same manner, and at the same rate as constitutionally authorized franchise fees. The only difference between traditional franchise fees and the Privilege Fee is that there is no requirement of consent by the electric utility. The Privilege Fee is unilaterally imposed by home rule ordinance. Simply stated, the Florida Constitution does not empower public utilities to determine, by their consent or lack thereof, which fees are valid and which are not.

ARGUMENT

I. A FEE IMPOSED FOR THE PRIVILEGED USE OF PUBLIC PROPERTY IS NOT A REGULATORY FEE NOR A TAX.

Local governments have the inherent authority to unilaterally impose rental charges for those who use and occupy public property in a privileged manner. See City of Pensacola v. Southern Bell Telephone Company, 37 So. 820 (Fla. 1905); Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So.2d 1159 (Fla. 1st DCA 1992). This Court, in City of Pensacola v. Southern Bell Telephone Company, upheld the unilateral imposition of a rental fee for the privileged use of the city streets by utility companies:

> [M]unicipalities which have the power and are charged with the duty of regulating the use of their streets may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of their streets by telegraph and telephone companies, and may also impose a reasonable charge in the enforcement of local government supervision, the latter being a police regulation.

37 So. at 823 (emphasis added). This Court reasoned that the unilateral imposition of the rental charge was an exercise of the city's duty to regulate its streets and was therefore imposed for two purposes: (1) to receive rent and (2) to regulate the use of the streets.

Furthermore, notwithstanding the Jacksonville Port Authority's status as a special district possessing only powers expressly delegated by statute, the First District Court in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc. approved its unilateral imposition of rental or privilege use fees for Alamo's use of

airport property to conduct its rental car business under the following reasoning:

> Again, in assessing and collecting the user fee, the JPA is acting in a proprietary capacity requiring those who benefit from its airports to pay their fair share of costs incurred in providing the benefits.

600 So.2d at 1164. The First District Court in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc. distinguished the case law construing the requirements for a valid regulatory fee as follows:

> Thus, the crucial point in resolving the tax issue is to recognize that the JPA does not purport to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status.

600 So.2d at 1164.

Consequently, in both the City of Pensacola and Jacksonville Port Authority decisions, a fee unilaterally imposed as rental for a privileged use of public property was upheld as a valid user fee and not a tax. The validity of the fee in both cases did not depend on how the fee was calculated. For example, in City of Pensacola v. Southern Bell Telephone Company the amount of the fee was calculated as a per pole charge. However, in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc. the amount of the privilege fee was based upon six percent of the gross receipts received by Alamo from its rental car business at the off-site location. The factual

difference in the method of calculation was not the constitutional distinction between a valid fee and an unauthorized tax.[1]

Similarly, the difference between a valid franchise fee and a valid rental or privilege fee is a factual, not a constitutional, distinction. Under the fact patterns of the cases construing express franchise agreements, the franchise fee is part of the contractual provisions contained in the franchise agreement. To this extent, the franchise fee is part of a "consented to" or "bargained for" contractual agreement.[2] The rental or privilege fee approved in City of Pensacola v. Southern Bell Telephone Company and Jacksonville Port Authority v. Alamo Rent-A-Car, Inc. were unilaterally imposed. The constitutional basis for distinguishing both a franchise fee and a rental or privilege fee from a tax is fundamentally the same. For the purpose of such constitutional analysis, the franchise fee is the functional equivalent of the Privilege Fee.

All parties in this case agree that a franchise fee imposed under a franchise agreement is not a tax requiring general law

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[1] See also St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), rehearing den'd, 149 U.S. 465 (1893) (upheld the unilateral imposition of a fee of $5 per pole erected in city streets). The Supreme Court distinguished the rental fee from a tax by stating that the fee "is more in the nature of a charge for the use of property belonging to the city . . . that which may be properly called rent." Id. at 97.

[2] Although, franchise agreements can be unilaterally imposed without prior utility consent. See Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991) (challenge by cable television operation of unilaterally imposed franchise fee and franchise agreement requirement); Berea College Utilities v. City of Berea, 691 S.W.2d 235 (Ky. App. 1985) (challenge by successful bids of utility franchise of franchise fee based upon percentage of gross revenues).

authorization. Franchise fees, like the rental or privilege fees construed in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., are consistently calculated as a percentage of gross revenues derived from the business activity which uses public property in a privileged manner. A franchise fee of six percent of gross revenues was approved in City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976), Rosalind Holding Company v. Orlando Utilities Comm'n, 402 So.2d 1209 (Fla. 5th DCA 1981), rev. den'd, 412 So.2d 469 (Fla. 1982), and Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So.2d 1139 (Fla. 1st DCA 1992). Alachua County's three percent functionally equivalent Privilege Fee clearly carries a presumption of reasonableness because the establishment of the fee amount was an exercise of the Alachua County Board of County Commissioners' legislative discretion. See Rosche v. City of Hollywood, 55 So.2d 909 (Fla. 1952); New Smyrna Beach v. Internal Improvement Trust Fund, 543 So.2d 824 (Fla. 5th DCA 1989).

Determining the amount of a rental or privilege fee as a percentage of gross revenue derived from the privileged use of public property reflects modern life in Florida. With the incorporation of computer technology into modern utility billing practices, the expression of a rental fee as a percentage of gross receipts facilitates the direct billing of rental or privilege fees to the ultimate electric utility customer as mandated by the Florida Public Service Commission. See Rules 25-6.100(2)(c)(6), and 25-6.100(7), Fla. Admin. Code; see also City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976). A rental or privilege fee calculated on a per pole basis is inconsistent with such direct

billing policy and is impractical when the tremendous growth being experienced by all local governments in Florida is considered. The common acceptance of a percentage of gross receipts as the standard method for calculating a rental or privilege fee does not lessen the force of the early precedent prescribing the difference between a valid rental fee and a tax.

II. CONSTITUTIONAL PRINCIPLES AND SOUND PUBLIC POLICY REQUIRE THAT THE IMPOSITION AND THE AMOUNT OF A PRIVILEGE FEE REMAINS A GOVERNMENTAL DECISION NOT DEPENDENT ON THE CONSENT OF THE BENEFITED PUBLIC UTILITY.

The managers or stockholders of an electric utility are not elected by the citizens of Alachua County. The Alachua County Commission is. Under the Intervenors' reasoning as accepted by the circuit court, whether a governmental unit has the authority to impose a rental or privilege fee is within the complete discretion of the electric utility. This argument asserts that, absent its consent, a rental or privilege fee cannot be constitutionally imposed. Under this constitutional theory, neither the framers of the Florida Constitution nor the electors who approved it intended local governments in Florida to possess the power of local self-government to impose fees for a fair rental of public property by electric utilities. This constitutional theory incorporates a requirement of utility consent in the applicable provisions of the Florida Constitution and concludes that the novel home rule provisions embodied in the 1968 constitutional revision do not include the ability to unilaterally impose a rental fee for the use of public property.

Accepting the reasoning of the circuit court empowers the electric utility with the authority to choose which local governments can impose a rental or privilege use fee and which cannot. Under this reasoning, the discretion of an electric utility is apparently without limits.

In addition, this flawed analysis ignores the one who pays the fee imposed, whether the fee is in the form of a franchise fee or the Alachua County Privilege Fee. The fee is paid by the electric utility customer not the electric utility. The electric utility serves as a billing and collection agent. The obligation to pay is not its burden.

The Alachua County Privilege Fee was imposed by an ordinance adopted at a duly advertised public hearing, providing the ultimate feepayer an opportunity to be heard. The decision to impose the fee is a classic legislative decision placed on elected governmental officials. One has difficulty understanding the constitutional principle advanced by the Intervenors and adopted by the circuit court. On what constitutional basis is the decision to impose a governmental fee left to the discretion of the business that serves as the collecting agent?

A balanced and fair relationship within the framework of the Florida Constitution requires that all local governments be treated the same and be vested with the full power of local self-government. Such home rule power is not dependent upon the consent of electric utilities to a fee for the exercise of privileged use of public property.

CONCLUSION

Alachua County has constitutionally sufficient authority to adopt Ordinance 97-12 and impose the Privilege Fee. Furthermore, the Privilege Fee is a user fee, in the nature of a rental, to which electric utilities do not have to consent for the fee to be valid. Thus, this Court should reverse the ruling of the circuit court in this case.

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 the persons on the attached Service List this 20th day of July, 1998.

William J. Roberts

WILLIAM J. ROBERTS