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.,

Appellees.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE FLORIDA POWER & LIGHT COMPANY

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CERTIFICATE OF SIZE AND STYLE OF TYPE

Appellee Florida Power & Light Company certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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PREFACE

Appellee Florida Power & Light Company, a defendant/ intervenor in Case No. 97-3088-CA (bond validation action) and plaintiff in Case No. 97-4368-CA (declaratory judgement action), consolidated below for all purposes, including appeal, shall be referred to in this brief as "FPL." Appellant, Alachua County, Florida, plaintiff in Case No. 97-3088-CA (bond validation action) and defendant in Case No. 97-4368-CA (declaratory judgement action) below, shall be referred to in this brief as "Alachua County" or "the County."

References to the Appendix to FPL's Brief shall be designated by the symbol "A" followed by the tab and page number (e.g., "A.1" means Appendix at Tab 1; "A.1.2-3" means Appendix Tab 1 at pages 2 and 3). References to the Appellant's Initial Brief shall be designated "Br. at __." References to the brief of Amici Curiae Florida Association of Counties and Florida Association of County Attorneys, Inc. shall be designated "Assoc. Br. at __." References to the brief of Amicus Curiae City of Altamonte Springs shall be designated "A.S. Br. at ___."

All citations to Florida Statutes are to the 1997 edition, unless otherwise noted. All emphases to quotations are in the original, unless otherwise noted.

STATEMENT OF THE CASE

Alachua County commenced this litigation on August 15, 1997, in the form of a bond validation proceeding pursuant to Chapter 75, Florida Statutes, seeking validation of certain Capital Improvement Revenue Bonds and a judicial determination of the validity, legality and enforceability of the Electric Utility "Privilege Fee" imposed by Alachua County Ordinance 97-12 ("Privilege Fee"). A.29. Among other things, Ordinance 97-12 purports to impose a "fee" upon "Electric Utilities," calculated as a percentage of "Gross Revenues" derived from their sale of electricity to customers located in Alachua County, for the purported "privilege" to use and conduct an electric business within "County Rights-of-Way." A.2.8-9,11-13(§§2.01,2.05). The County simultaneously adopted Resolution 97-80, stating its intent to use the "Privilege Fee" proceeds "to provide reduction of the County-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County in the funding of essential County-wide governmental services." A.5.2-3(§§1(a),2).

FPL intervened and opposed the County's complaint on the grounds that the "Privilege Fee" is not a valid fee, but is instead an unlawful tax preempted to the State of Florida under Article VII, Section 1, Florida Constitution, and therefore exceeds Alachua County's authority under Article VIII, Section 1(g), Florida Constitution and section 125.01(1), Florida Statutes. Additionally, FPL, the City of Gainesville and the University of Florida brought separate actions seeking

declaratory and injunctive relief on similar grounds.[1]

The bond validation and declaratory relief actions were consolidated for all purposes, including appeal. A.39,44,45,46. The central issue in all four consolidated cases is the validity of the "Privilege Fee." See State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994) (invalidating bonds because "fee" pledged was not a valid user fee, but an unauthorized tax).

Upon motions for summary judgment, the circuit court entered its Final Summary Judgment on June 1, 1998.[2] Based on "extensive" evidence in the record, the circuit court found no material dispute as to the following:

1. The Privilege Fee is not related to the extent of use by electric utilities of the county rights-of-way.

2. The Privilege Fee is not related to the reasonable rental value of the land occupied by electric utilities within the county rights-of-way.

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[1] In both the bond validation and declaratory proceedings, FPL also argued that Ordinance 97-12 (1) is preempted by and inconsistent with general law, (2)impairs contracts between FPL and its customers, (3) violates due process, (4) unlawfully delegates legislative authority, (5) denies equal protection, and (6) establishes an interlocal agreement without lawful authority. A.35,37,40,43. In light of its ruling that the "Privilege Fee" is an unconstitutional tax, the circuit court declared all other issues "moot." A.1.9-11. If summary judgment is not affirmed, these issues remain for resolution on remand.

[2] The County incorrectly argues, without authority, that a bond validation proceeding is a "summary proceeding" in which entry of a summary judgment under Rule 1.510 is "inappropriate." Br. at 8 n.6. Rule 1.510 applies "to all actions of a civil nature and all special statutory proceedings in the circuit courts ...." Fla. R. Civ. P. 1.010. In any event, the County does not seek reversal on this basis, stating that "no genuine issue of a material fact exists ... that would have required testimony or evidence at the show cause hearing." Br. at 8 n.6.

3. The Privilege Fee is not related to Alachua County's costs of regulating the use by electric utilities of the county rights-of-way.

4. The Privilege Fee is not related to the cost of maintaining ... county rights-of-way occupied by electric utilities.

5. The Privilege Fee does not represent a bargained-for agreement between Alachua County and any electric utility, but was unilaterally imposed ... by the county.

6. [U]tilities providing electric service ... in Alachua County cannot reasonably avoid the Privilege Fee by removing their equipment and facilities from the county rights-of-way.

7. The revenue derived from the imposition of the Privilege Fee is intended to fund general county operations and to reduce the county ad valorem tax millage rate. (A.1.5).

The court also found that (a) the "Privilege Fee" was imposed for the sovereign purpose of raising general revenue, not for a proprietary purpose; (b) the "Privilege Fee" is a forced charge which was not bargained for or agreed to, in exchange for which (as the County concedes) the County "provides no additional services, relinquishes no rights, and grants no vested, constitutionally protected and enforceable property rights to electric utilities for any definite term of years"; (c) "the Privilege Fee is not the 'functional equivalent' of a franchise fee"; (d) "there is simply nothing here on which to base an assertion" that the "Privilege Fee" is a reasonable rental charge; (e) electric utilities have a statutory duty to provide electricity to their customers; (f) "[t]he majority of poles and other equipment necessary for the transmission of electric power to these customers is located within public rights-of-way"; (g)

"the County concedes it has no knowledge as to what the rental value of its rights-of-way might be"; (h) the "Privilege Fee" is not based on the actual occupation of rights-of-way; and (I) the "Privilege Fee" "bears no discernible relationship to the value of the property actually occupied by the electric utility's ... facilities." A.1.4-9. The circuit court concluded that

> [t]he Privilege Fee is not a reasonable rental charge, a user fee or a franchise fee.... [It] is a mandatory, unavoidable charge imposed by the county in its sovereign capacity for the purpose of providing general revenue for the use of Alachua County. As such, it is a tax. Because the county is not authorized by general law to levy this tax, it is unconstitutional and cannot be a legitimate source of revenue the County may pledge for repayment of its proposed bonds.

A.1.9. The County appeals from this judgment.

STATEMENT OF THE FACTS

Although the County claims that "no genuine issue of material fact exists," Br. at 8 n.6, it steadfastly refuses to address the copious undisputed facts upon which the trial court specifically relied and which consistently belie its factual and legal assertions here. These facts are essential to this Court's review of that judgment and are therefore set forth in detail below and documented in FPL's appendix.

Ordinance 97-12 Is a Substitute for Ad Valorem Taxes

"[T]he power ... to tax should not be broadened by semantics ...." Port Orange, 650 So. 2d at 3. Weighed down with the superficial trappings of a fee and bulging with self-serving

"findings" and "declarations," Ordinance 97-12 is, in the eyes of everyone associated with its enactment, a surrogate tax. The money it generates will offset, dollar for dollar, an intended reduction in ad valorem taxes so that the general costs of running the County are more "equitably" apportioned among all who benefit from County services.[3]

Resolution 97-80 memorializes what virtually every County representative -- including all five County Commissioners, the County Manager and the County's special counsel -- has verified:

- The ordinance is intended to lessen what the County perceives to be a disproportional ad valorem tax burden on "the taxable property owner" due to the exemption of governmental property ... under the Florida Constitution, as "an issue of equity in the funding of essential County-wide governmental services." (4th Whereas Clause & § 1(a), A.5.2)
- "It is the intent of the Board to apply ... fee proceeds ... to provide reduction of the County-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County." (§ 2, A.5.3)

In the County's view, because of limitations on its ability to impose ad valorem taxes, due in part to exemption of government property, the costs of County services are borne disproportion-

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[3] See A.8.6-7,16,26; A.9.19; A.10.7,21; A.16.80; A.18.57-58; A.19.19,25; A.23.20; A.20.52,81,84-85,118; A.21.40-41,63,132-33; A.48; infra n. 4. It is therefore not surprising that Commissioners and other County representatives have repeatedly and accurately characterized the "fee" as "a tax" and a "new utility tax" intended to "diversify the ... tax structure of Alachua County," "diversify the tax base," "broaden [the] tax base," "allow ... more people to pay taxes," and require "that government pay its fair share just like any other business activity" as a "tax equity decision." A.27.127,31,6,7,127,126,23; see also A.49 (tentative budget listing "Privilege Fee" under "Taxes").

ately by those who do pay these taxes. The "Privilege Fee" will be paid by essentially everyone who uses electricity. These "fee" revenues will fund all of the same costs and services as ad valorem taxes. The costs of government are simply being spread among more residents. This is not a "fee," but a detour around constitutional limitations on the County's taxing authority.[4]

Ordinance 97-12 attempts to effect this result by imposing a "fee" on the sale of electricity -- a necessity of life. The ordinance imposes a "fee" of three percent of "Gross Revenues" received by "Electric Utilities" from the sale of electricity in Alachua County. A.2.11-12(§2.05(A)). Tax "equity" is achieved by converting the "fee" into "a debt of the Electric Utility customer ...." A.2.13(§2.05(E)). The utility is merely a conduit. In this fashion, the County creates the facade of a fee, while imposing the payment burden, tax-like, on essentially every resident of the County. According to the County, the "Privilege Fee" will increase its general revenues -- through unavoidable utility charges -- by approximately $4.5 million per year. A.8.26; A.18.151-52; A.21.158-60; A.31(nos.5-6). Ad valorem taxes are to be reduced by the same amount. Thus, the "fee" is intended to be "revenue neutral" to the County. See

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[4] A.8.5-8,16,26,28-29; A.9.4-5,18-19; A.10.5,7,19,21,25-26; A.16.80; A.17.59,99-100; A.18.52-58,115-18,122,167,182; A.19.4,9, 19,24-25; A.20.44,46-47,52,80-82,84-85; A.21.40-41,63,127,132-33, 150-52,154-55,158-60; A.23.8-9,20,26-27; A.26.14; A.32(no.11,14).

supra n. 3.

Electric Utilities Become the Tax Collector

Ordinance 97-12 directs utilities to collect the "Privilege Fee" for the County. The "fee" is passed through to the utility customer. A.2.14(§2.06).[5] In the event of nonpayment, the "fee" may be collected, like any unpaid tax, by the Uniform Method of Collection. A.2.16-17(§2.08) (citing §§ 197.3632, 197.3635, Fla. Stat. [charge is placed on tax bill and subject to all available tax collection methods]). The County reimburses the utilities for their tax collection services. A.2.13-14(§§2.05(E),2.06).

The Privilege Fee Has No Relationship to Right-of-Way Use

The "fee" is imposed upon electric utilities for their so-called "privileged use of County Rights-of-Way" (A.2.13, (§2.05(D)), "for the privilege of conducting an electric business on the County Rights-of-Way" (A.2.13(§2.05(E)), and for the "privilege" of using County rights-of way for the placement and use of electric facilities (A.2.8-9(§2.01(A)). In actuality, utility use of public rights-of-way for the public purpose of

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[5] Certain customers are exempted. The County admits it "has no home rule power to exempt directly any customer from [the "fee"]." Res. 97-80, A.5.3 (§1(b)); A.32(no.10). Tiptoeing once again around its constitutional and statutory limitations, the County directs its manager and attorney to prepare an interlocal agreement with the school board to provide for payments to the school board to render the "fee" revenue neutral. A.5.4(§3). A "utility assistance program" is also established to ensure that low-income residents "are not adversely impacted ..." A.5.4(§4). The County provides no standards for these exemptions.

providing electric service is not dependent on the grant of a "privilege" by the County, and Ordinance 97-12 does not provide any rights not previously provided by County permits. See infra pp. 9-10. This phantom "privilege" is further undermined by the fact that the "Privilege Fee" is not based on actual use of County rights-of-way or any cost or value related to such use. See infra pp. 10-13. Indeed, the ordinance expressly states that the "Privilege Fee is not based on the extent and scope of the Electric Facilities that are located in County Rights-of-Way." A.2.13(§2.05(D)).[6] The fee is imposed on a utility's County-wide gross receipts even if only one facility is placed in one County right-of-way, regardless of the number of customers served, or the gross revenues generated, by that facility. It is imposed even if a utility's sole use of right-of-way is a single aerial crossing by one wire, a single sign, a single pole or a single fence. Id.; A.10.16; A.17.81; A.20.102-03; A.30(nos.1,2).

Apparently, the use of rights-of-way is a "privilege" only for electric utilities and a "right" for all other users of the same rights-of-way. Electric utilities are the only users being taxed. The "Privilege Fee" is not paid by any other utilities

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[6] The County argues for the first time on appeal that this provision applies to the "rate" or "amount" of the "fee." See, e.g., Br. at 5. That is not what the ordinance says, and the fact that some electric utilities that use County rights-of-way pay no "fee" under the ordinance proves that neither its imposition nor amount is based on the extent and scope of use.

such as telecommunications, gas, water and sewer companies that use these rights-of-way. A.8.19-20,22,32; A.10.14-15; A.12.110-12; A.19.8; A.20.21-22; A.21.67; A.23.14.[7]

The fee is not even imposed on every electric utility. An electric utility with one wire crossing one County road would pay three percent of in-County revenues, whereas another utility with a thousand poles in County rights-of-way would pay no fee whatsoever, as long as its revenues come from customers outside of the County or from customers in municipalities receiving a franchise fee, or if the utility has a franchise agreement with the County. A.2.3-5,11-12(§§ 1.01["Electric Utility" and "Licensed Electric Utility"],2.05(A)&(B)); A.30(nos.6,20).

County Permits Already Allow Use of Rights-of-Way

Electric utilities have been lawfully placing their facilities in County rights-of-way for many years. A.12.167; A.18.28; A.30(no.14); A.38(nos.25-26). The County's only regulation of such use has been and is to issue permits for the installation, operation and maintenance of utility facilities, for which the County charges a regulatory fee based on costs associated with the utility permits. A.8.41-42; A.12.141; A.13.94; A.19.26; A.20.26-27,29,53; A.21.7,10-11; see also §§ 337.401(1),(2), Fla. Stat. These permits expressly provide that

[7] Permits are also issued to individuals for use of County rights-of-way. A.12.180. These individuals are not taxed either.

they are a license for use only and do not create or vest any property rights. A.47.1.

No Property Rights Are Relinquished and No Additional Services Are Provided

Contrary to the County's naked assertions on appeal, the circuit court found as undisputed fact and the record abundantly establishes that no property rights are relinquished by the County or acquired by electric utilities under the ordinance. A.8.42-43; A.9.11-12; A.10.29-30; A.12.177; A.19.26; A.18.32-33; A.30(nos.21-23). Ordinance 97-12 provides that "[n]o Electric Utility shall acquire any vested rights hereunder which would limit in any manner the County's right to amend, modify or revoke this Ordinance," A.2.19(§4.03), and the County has admitted that no additional services are provided in exchange for the "Privilege Fee." A.8.42; A.12.99,113; A.19.22; A.20.51-53,112; A.21.71; A.22.29; A.23.23; A.30(no.11). Ordinance 97-12 does not provide electric utilities or the public with anything in connection with utility use of rights-of-way not previously provided by permit. A.8.42; A.12.109,166-69; A.14.18-19; A.18.33,43; A.20.26,29,53,58-59,61-62; A.21.27,71; A.22.29,32-33.

The "Privilege Fee" Has No Relationship to Any Value or Costs Associated With Electric Utility Use of County Rights-of-way

Ordinance 97-12 defines the "Electric Utility Privilege Fee" as being imposed for the following purposes:

> (A) reasonable compensation for the privileges granted in this Ordinance to use and occupy the County Rights-

of-Way for the construction, location or relocation of Electric Facilities;

(B) fair rental return on the privileged use of public property for a proprietary purpose; and

(C) payment of the cost of regulating the County Rights-of-Way and protecting the public in the use and occupancy of such County Rights-of-Way. A.2.4(§1.01).

However, the record unequivocally establishes that these "purposes" are window dressing to create the illusion of legitimacy for this unlawful tax. The "Privilege Fee" is not related to or based on any "reasonable compensation," "fair rental return," "fair rental value," regulatory costs, or any other value or costs associated with electric utility use of County rights-of-way.[8] As acknowledged by the County, the true purposes of the "Privilege Fee" are to broaden and diversify its tax base and raise general revenues for the support of County government by collecting fees from all County electric customers, including governmental entities exempt from ad valorem taxes.[9]

Since it also admits that the "Privilege Fee" is neither based on the extent and scope of utility use of rights-of-way nor on any costs or value relating to such use, it is self-evident that the County did not determine any use-related value or costs

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[8] See A.8.15,25,47; A.9.25; A.10.25; A.12.97-98,166,173-76; A.14.31-32; A.16.62-67; A.17.20-22,86; A.18.18-21,26-27,45-47,68-72; A.19.16-17,30; A.20.35; A.21.12-13,18-19,36-40,50-52; A.22.31,34,36-37; A.23.11,16,21; see also infra pp. 12-13.

[9] See supra nn. 3-4 and accompanying text. Thus, the Privilege Fee is nothing more than an increase of the County's public service tax already imposed on the purchase of electricity at the maximum rate (10%) allowed by law. § 166.231, Fla. Stat; see also A.8.44-45; A.17.36; A.18.83,85,87; A.21.56-57,59-60.

and then set the "fee" accordingly. To the contrary, it determined the amount of the "fee" based on the amount of general revenues it wanted to raise and the reduction in ad valorem taxes it desired. A.8.6-8,16; A.20.46-47; A.23.20; A.26.5,9-10.[10]

Indeed, the County made no effort to identify, analyze, quantify, consider or determine: (1) the County's costs of regulating utility use or occupancy of rights-of-way or of protecting the public regarding this use; (2) any other costs, including any actual maintenance costs, associated with utility use or occupancy of rights-of-way; (3) the reasonable rental value of rights-of-way; (4) the relationship, if any, between the amount of the "fee" and any actual costs or value associated with utility use of rights-of-way; (5) the actual extent to which utilities use or occupy rights-of-way; (6) the County's rights, titles and interests in rights-of-way being used by utilities, the manner and cost of acquiring same, or their value; (7) the extent to which utility customers are served by rights-of-way that do not belong to the County; or (8) the actual extent to which the County regulates electric utility use or occupancy of rights-of-way.[11] In short, there is no factual support whatsoever for any of the so-called "findings" and "declarations" in

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[10] The fee was set to raise $4 million, which equates to one mil of ad valorem revenues. A.26.5,9-10; A.27.6-9,58-59,81,121.

[11] A.8.14-15,24-25,47; A.9.25; A.10.9,15-17; A.12.20,97-98,116-17,140,147,156,163,166,173-76; A.14.23,30,32,46-47; A.16.62-67; A.17.11,20,22-23,86,105-06; A.18.4-5,17-27,45-47,68-72,104,171-73; A.19.12-13,16-17,30,37-38; A.20.32-33,35-36,41-42,116,123; A.21.6-7,11-14,16-19,36-40,50-51,68,74,105; A.22.30-32,34,35-37; A.23.11,16; A.30(no.5); A.31(nos.2-3,7).

the ordinance concerning the purposes and bases of this "fee."[12]

"Privilege Fee" Proceeds Will Fund General Operations

The use of "Privilege Fee" proceeds is unrestricted. A.9.35-36; A.17.99-100; A.18.56-57; A.23.9. They are not earmarked for any special funds, uses, departments or purposes. A.18.52,57,182; A.19.10; A.20.118. They will go into the County's general coffers and be used for County-wide governmental operations. They will be used for the same purposes as the ad valorem tax receipts they will be replacing, A.8.8,28; A.10.19, 26; A.17.99; A.18.155-57; A.19.9-10; A.21.40-41; A.23.9, and may also be pledged to secure bonds for capital improvements unrelated to roads. A.4; A.7.2; A.31(nos.1,8).

Ordinance 97-12 Does Not Grant a "Franchise"

The ordinance declares that the "Privilege Fee" is "the functional equivalent of a franchise fee" and that it is "reasonable and consistent in amount and within the method of calculation historically bargained for by electric utilities in securing a franchise ...." A.2.13-14(§§2.05(D),2.06(A)). There is nothing in or outside the record to support this factual leap. The County presented nothing to its Commissioners prior to enactment of the ordinance and nothing to the court below to justify this "equivalence" that the County finds so central to its argument. Indeed, it could not.

The "Privilege Fee," like a tax, is unilaterally imposed.

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[12] A.8.47; A.12.97,173-75,186; A.14.48; A.16.64-67; A.18.45-47,68-72; A.19.30; A.21.36-40,50-52; A.22.31,36-37; A.23.21.

A.2.8,11,13; A.9.49; A.10.9; A.18.32,73; A.21.73; A.30(no.19); A.32(nos.2-3). The amount of the "fee" -- indeed the phantom "privilege" itself -- lasts only so long as the County decides. Nothing vests. A.2.19(§4.03); A.8.34,42-43; A.9.13,49; A.18.32-33,67-68,77; A.20.83-84; A.21.26-27. Franchise agreements, by overwhelming contrast, are long-term, bargained-for, fixed-rate contracts negotiated at arms length with local governments. A.10.8-9; A.11.7-8,26; A.15.7,25-27; A.17.103; A.18.30,72; A.24.2(¶4). In its franchise agreements, FPL bargains for and receives vested, enforceable rights for the customary thirty-year term of the agreement. A.11.8-9; A.18.30,33,76-77; A.24.2(¶4). The most essential of these vested rights, and the one most central to the franchise agreement, is the government's agreement not to compete with FPL in distributing and selling electricity. A.11.9,30-31,33-34; A.15.26-27,29-31; A.18.73,76; A.24.2(¶4). In exchange for these vested rights, the local government receives a fee. A.11.26,30-31,33-34; A.24.2(¶5).

Furthermore, contrary to the County's contrivance, for which it offers no record support, FPL's franchise fees are not six percent of gross revenues. They are an amount which when added to other charges will equal a certain percentage (sometimes six, sometimes less) of certain specified forms of revenues. A.11.17; A.15.7-12,18-23,42-45; A.24(Exs.1-4). The franchise fee is never six percent of gross revenues and varies greatly depending on the percentage negotiated and the other charges paid in any given jurisdiction. Id.

The County also leads the Court astray when it states that

the Public Service Commission ("PSC") determines the amount, or calculation method, of FPL's franchise fees. Br. at 10, 37. Every provision in FPL's franchise agreements, including the fee amount and fee calculation, is negotiated by FPL and the local government. A.11.7-8,26; A.15.7-12,25-27; A.17.103; A.18.30,72; A.24.2(¶4). The PSC only determines how those negotiated fees may be collected from customers. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); Fla. Admin. Code R. § 25-6.100(7) (subsection only specifies "method of collection").

Although franchise agreements recognize FPL's right to place its facilities in public rights-of-way to serve the public, the franchise fee is not based upon a fair rental (or any other) value of rights-of-way, a fair rental (or any other) return on FPL's use and occupancy of such rights-of-way, or payment of the local government's cost of regulating such use and occupancy. A.11.30-31,33-34; A.15.26-31,35-41; A.24.2-3(¶5).

FPL Right-of-Way Use Is in the Public Interest

FPL provides public works and is regulated by the PSC as a public utility. It has a statutory duty to supply "reasonably sufficient, adequate, and efficient service upon terms required by the [PSC]." § 366.03, Fla. Stat. Pursuant to this duty, FPL serves customers in 35 counties and over 160 municipalities in Florida, including Alachua County. A.25.2(¶5).

FPL has installed electric facilities in public roads and other public places. A.25.2(¶4;Ex.1). To meet its duty to customers in Alachua County, including the County itself, it is

necessary for FPL to traverse public roads within the jurisdiction and control of the County. A.25.3(¶¶6-7).

Alachua County holds all County roads and County rights-of-way in trust for the public. A.2.7(§1.02(C)); A.8.56-57; A.19.33; A.21.66-67; A.27.8,114. FPL's service provides a benefit to the County and its citizens. It is a public purpose and in the public interest for its facilities to be placed in public rights-of-way. A.18.27-28; A.21.66-67. Indeed, the State has delegated its sovereign right of eminent domain to FPL to condemn any public or private lands upon making due compensation only to private owners. § 361.01, Fla. Stat. Other users of public rights-of-way, such as telephone and cable television companies, do not have such eminent domain rights.

SUMMARY OF ARGUMENT

Enactment of the "Privilege Fee" did not begin with an analysis by Alachua County of its costs in regulating and maintaining its rights-of-way or of their value. This analysis never took place. Nor did enactment begin with an informed comparison of franchise fees with the "Privilege Fee." This comparison never took place either. Enactment began -- and ended -- with a desire to maintain the County's revenues while reducing the amount of its ad valorem taxes.

Packaged by outside counsel and subjected to essentially no factual or legal scrutiny, the "Privilege Fee" is indefensible as a fee of any kind whatsoever. Since it was never designed as a

fee, it cannot be justified as a fee -- which explains the County's feverish game of legal hopscotch as it seeks to evade the irrefutable label of "tax."

Nothing fits. Although characterized at times as a regulatory fee, the County has receded from this position because the revenues to be raised are not based on, and far exceed, any costs of regulation. Moreover, the fees are to be dumped into general revenues for any County purpose rather than earmarked for the regulation of electric utility use of County rights-of-way.

Calling it a user fee serves the County no better. User fees must be based on the extent of use, paid by choice, imposed for proprietary purposes, and, like regulatory fees, based on and dedicated to defraying the cost of providing the service being used. None of these features applies here.

The rental charge rationale is pure fiction. The County never valued the rights-of-way, never attempted to determine a fair rental rate, never allocated the rental among actual users and proposes to charge the same "rental" regardless of the scope of use of the "rented" property. One foot or one hundred miles of right-of-way use, the rent is the same.

When all cost/value-based rationales had to be abandoned for want of factual support, the County fastened on the device of "functional equivalence." Its "fee" is supposedly lawful because it is the "functional equivalent" of a franchise fee, to which, the facts demonstrate, it bears no resemblance whatsoever. Unlike negotiated franchise fees, no utility has agreed to the "Privilege Fee," and this Court has already established that lack

of agreement alone renders this an unauthorized tax. Plant City, 337 So. 2d at 973. Moreover, contrary to the County's cornerstone argument, consent is not the only difference between franchise fees and the "Privilege Fee." Franchise agreements are negotiated contracts providing utilities with enforceable vested rights, including surrender of the governmental power to perform a public service, a covenant not to compete by the local government in that service, and a set fee for a guaranteed term of years. The "Privilege Fee" provides nothing of the sort.

The "Privilege Fee," in the County's facile hands, becomes whatever it needs to avoid being what is being successfully challenged at the moment. Always the artful dodger, this "fee" has, as a consequence of the circuit court's ruling, undergone yet another transformation on appeal. It now emerges as a charge "imposed for the relinquishment of specific property rights." Br. at 9, 15-19, 25, 30, 31, 41. This in the face of the circuit court's finding as an undisputed material fact that no property rights are relinquished by the County. A.1.8-9. No sleight of hand can obscure the true nature of the "Privilege Fee" as an enforced burden for the support of a sovereign government, designed to skirt constitutional limitations on the County's taxing powers. It is, in short, a tax. State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994).

ARGUMENT

I. THE "PRIVILEGE FEE" IS AN UNCONSTITUTIONAL TAX

The circuit court did a remarkable job sifting through the County's numerous, inconsistent theories, rejecting each one in a judgment reflecting careful study of the undisputed facts and clear Florida law. The court arrived, by thorough analysis, at the inescapable conclusion that the "Privilege Fee" is an unauthorized tax. For the following reasons, this well-reasoned judgment should be affirmed.

A. Home Rule Powers Of Charter Counties Are Limited By The Florida Constitution And General Florida Law

Alachua County claims that the "Privilege Fee" is authorized by its home rule powers as a charter county. While home rule powers are broad, the County has no authority to enact ordinances that are preempted by or inconsistent with general law. Art. VIII, § 1(g), Fla. Const.; § 125.01(1), Fla. Stat.; Florida Power Corp. v. Seminole County, 579 So. 2d 105, 107 (Fla. 1991).

B. The "Fee" Violates, And Is Preempted By And Inconsistent With, Constitutional And Statutory Limitations

The Florida Constitution preempts to the state all forms of taxation except ad valorem taxes and any other taxes authorized by general law. Art. VII, §§ 1(a) and 9(a), Fla. Const. Not only is there no authorization for the County to tax utility use of rights-of-way, the cynical purpose of the "Privilege Fee" is to circumvent constitutional and statutory limitations on the taxing authority it does have, namely, the exemption of governmental property from ad valorem taxes. Art. VII, § 3(a),

Fla. Const.; § 196.199, Fla. Stat.[13]

While the County has gone to extraordinary lengths to dress this tax as a fee, it cannot escape its true nature. In Port Orange, 650 So. 2d 1, this Court faced issues very similar to those here. In response to revenue pressures, Port Orange imposed a "transportation utility fee" on owners and occupants of developed properties within the City, purportedly based on their use of the local road system. The utility fee was pledged for the repayment of bonds, for which validation was sought. The trial court ruled that the utility fee was a valid home rule user fee. This Court, however, unanimously held that it was an unauthorized tax and invalidated the bonds.

The Court's analysis in Port Orange is controlling here and was followed closely by the circuit court. This Court recognized that the utility fee was a creative effort to raise revenue in the face of constitutional limitations on the City's ad valorem taxing power, but held that such "constitutional provisions cannot be circumvented by such creativity." 650 So. 2d at 4. "Doubt as to the [City's taxing powers] must be resolved against the municipality and in favor of the general public." Id. at 3 (citation omitted). "[T]he power ... to tax should not be broadened by semantics which would be the effect of labeling what the City here is collecting a fee rather than a tax." Id.

Looking beyond the City's contrived labels, this Court

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[13] Among other limitations, the "Privilege Fee" also circumvents statutory limitations on the public service tax on electricity (§ 166.231, Fla. Stat.).

properly focused on the distinctions between a tax and a user fee. "[A] tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform." Id. User fees, on the other hand,

> are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved.... [T]hey are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.

Id. (citations omitted).

Applying these principles, this Court held that "[f]unding for the maintenance and improvement of an existing municipal road system, even when limited to capital projects as the circuit court did here, is revenue for exercise of a sovereign function contemplated within [the] definition of a tax." Id. In addition, the Court found that the utility fee was "a mandatory charge imposed upon those whose only choice is owning developed property within the boundaries of the municipality." Id. at 4. The effect of the utility fee was to "convert the roads ... into a toll road system, with only owners of developed property in the city required to pay the tolls," which a municipality has "no statutory or constitutional authority" to impose. Id.

The Alachua County "fee" is more clearly a tax than the one in Port Orange. Purportedly imposed for the use of existing public roads, it will generate revenue to support all County

government activities. Functioning identically to the ad valorem taxes it will replace, it is an enforced burden to support County government, and a mandatory charge imposed on those whose only choice is using utility facilities lawfully and necessarily placed in public roads. Neither utilities nor their customers can avoid the charge. As well, it is indistinguishable from the County's public service tax on electricity.

Additionally, although still unconstitutional, the fee in Port Orange was at least an allocation of road costs based on estimated usage, and was utilized only to defray costs "relating to the operation, maintenance, and improvement of the local road system." Id. at 1-2. The bonds in that case related to transportation facility costs. Id. at 3. In dramatic contrast, the "Privilege Fee" has nothing to do with the extent of electric utility use of roads or attributable costs; it is not restricted to defraying such costs; it will be used as general revenue to fund essential County-wide government services; and the bonds at issue herein are purportedly for government facilities unrelated to roads. *A fortiori*, therefore, the "Privilege Fee" is a tax.[14]

C. The "Privilege Fee" Is Not A Franchise Fee

There being no cost/value studies or analyses, the County's primary argument below was that the "Privilege Fee" is valid as

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[14] See also Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170 (Fla. 1960); Bozeman v. City of Brooksville, 82 So. 2d 729 (Fla. 1955); City of Jacksonville v. Jacksonville Maritime Ass'n, Inc., 492 So. 2d 770 (Fla. 1st DCA 1986); AT&T v. Village of Arlington Heights, 620 N.E.2d 1040 (Ill. 1993); United States v. City of Huntington, W. Va., 999 F.2d 71 (4th Cir. 1993), cert. denied, 510 U.S. 1109 (1994).

"the functional equivalent of a franchise fee." Absent facts, the County instead argued that the two "fees" are subject to the same constitutional analysis and founded on the same constitutional principles. It cited no case for this sweeping proposition. It cites none here.[15]

The "Privilege Fee" is not the equivalent of a franchise fee. It is a forced charge which was not bargained for or agreed to, and in exchange for which the County provides no services, relinquishes no rights, and grants no vested, constitutionally protected and enforceable property rights to electric utilities. In contrast, a franchise fee is "consideration paid by the utility for the grant of the franchise." Hialeah Gardens, 348 So. 2d at 1180 (emphasis added). A franchise is an agreement for a term of years in which the local government, acting in its governmental capacity, surrenders its right to provide a public service which it might otherwise provide and contracts with the franchisee to provide such service.[16] A franchise is an irrevocable contract entitled to constitutional protection as a property right. See Winter v. Mack, 142 Fla. 1, 194 So. 225, 229

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[15] In fact, the franchise fee cases cited by the County below, such as City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); City of Hialeah Gardens v. Dade County, 348 So. 2d 1174 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1212 (Fla. 1978), and Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994), recognize the unique characteristics of franchise fees which distinguish them from taxes such as the County's "Privilege Fee."

[16] See Buford v. Pinellas County Power Co., 87 Fla. 243, 100 So. 504 (Fla. 1924); see also City of Picayune v. Mississippi Power Co., 197 F.2d 444, 445 (5th Cir. 1952) (city acted in its governmental capacity in granting electric franchise).

(1940); Plant City, 337 So. 2d at 973 (franchise fees "are bargained for in exchange for specific property rights relinquished by the cities").

It is this surrender of the local government's right to provide competitive service, as a constitutionally protected property right -- not the franchisee's use of rights-of-way to provide that service[17] -- that is the essence of a franchise agreement and the consideration for a franchise fee. This is made clear by Florida Public Service Commission v. Florida Cities Water Company, 446 So. 2d 1111 (Fla. 2d DCA 1984). There, Lee County entered into franchise agreements which "authorized the utilities to use the county rights of way but did not obligate the county to perform any specific services for the utilities." Id. at 1112. Following relinquishment to the PSC of the county's utility regulatory authority, a dispute arose as to the county's further entitlement to franchise payments. The county argued that, despite the loss of its ability to protect utilities from competition, it still provided services, and the utilities still received benefits under the agreements, for which the county should be paid. See id. at 1113-14. One such purported benefit was the utilities' use of county rights-of-way.

The Second District, through then-Judge Grimes, disagreed with the trial court's holding that the county was entitled to

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[17] See 10 Eugene McQuillin, Law of Municipal Corporations, § 34.03 (3d rev. ed. 1990) [hereinafter "McQuillin"] (while a franchise is property, it is "separate and distinct from the property necessary in its use and exercise," and does not grant any proprietary interest in public roads).

further payment. It held that the county's ability to grant the utilities the authority to do business without competition "was the essence of the franchise agreement." Id. at 1114. Once relinquished, "there was nothing left upon which the franchise agreement could operate." Id. at 1113. "By itself, the right-of-way provision was not sufficient to keep the franchise agreement alive." Id. at 1114. The court noted and the county conceded that "under section 338.17, Florida Statutes (1981) [now section 337.401(1)], it could not deny a utility the nonexclusive use of county rights of way regardless of the existence of a franchise agreement." Id.[18] The court also noted that other utilities were not required to pay for the use of rights-of-way. See id. This holding unequivocally dispels any notion that a franchise fee is consideration merely for the use of public right-of-way, the very cornerstone of the County's argument here.

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[18] See also Dickson v. St. Lucie County, 67 So. 2d 662, 665 (Fla. 1953) (Road rights-of-way include "public utilities which do not interfere with the use of the right of way for highway purposes."); Nerbonne, N.V. v. Florida Power Corp., 692 So. 2d 928, 929-30 (Fla. 5th DCA 1997) ("grant of right-of-way for public road purposes [includes] public utilities"; "a power line ... is a proper use of a highway easement"; power lines are "adaptations of traditional highway uses"); City of Oviedo v. Alafaya Util., Inc., 704 So. 2d 206, 207-08 (Fla. 5th DCA 1998) (city enjoined from withholding approval of utility improvements based on utility's refusal to sign franchise agreement; while city could adopt reasonable rules and regulations "regarding the installation of utility lines and structures in a right of way" and "grant the use of a right of way to a utility in accordance with such rules or regulations" under §§ 337.401(1) and (2), Florida Statutes, it could not prohibit utility use of its rights-of-way "because [the utility] would not submit to the franchise terms unilaterally imposed"); Moore v. Thompson, 126 So. 2d 543, 550 (Fla. 1960)("The power to regulate does not encompass the power to prohibit").

The County asserts that the fundamental issue here is whether the fact that franchise fees are bargained for, while the "Privilege Fee" is not, makes the "Privilege Fee" invalid. This Court has already answered this precise question:

> [W]e have absolutely no difficulty in holding that ... franchise fees ... are not "taxes." The cities would lack lawful authority to impose taxes of this type [citing Art. VII, § 9(a), Fla. Const.] and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities.

Plant City, 337 So. 2d at 973 (emphasis added). The "Privilege Fee" is an unauthorized tax.[19]

D. The "Privilege Fee" Is Not A Valid User Fee

Alachua County argued below and continues to assert here that the "privilege fee concept" "takes root" in user fee cases such as Jacksonville Port Authority v. Alamo Rent-A-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 1 (Fla. 1992). That quantum analytical leap is simply not supported by the law. As a user fee case, Alamo is subject to this Court's analysis in Port Orange.

Moreover, the user fee in Alamo is demonstrably different than the County's "fee." Critical in Alamo was the holding that

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[19] Similarly, in Rosalind Holding Co. v. Orlando Util. Comm'n, 402 So. 2d 1209, 1212 (Fla. 5th DCA 1981), rev. denied, 412 So. 2d 469 (Fla. 1982), a case cited by Alachua County, the court held that a fee "labeled a 'franchise-equivalent' fee" and based on 6% of revenues was not a "real franchise payment" because there was no franchise agreement. In the same vein, Santa Rosa County and Hialeah Gardens held that franchise fees were not taxes because they were bargained-for consideration in franchise agreements. Santa Rosa County, 635 So. 2d at 103 (citing Plant City); Hialeah Gardens, 348 So. 2d at 1180 (same).

the "JPA operates as a proprietor of the airport system, and its imposition of the user fee is an incident of that proprietary status." 600 So. 2d at 1164. Thus, the fee "is not a general revenue source for the support of a sovereign government." Id. Here, of course, the "fee" is expressly a general revenue source for the support of all County government. In addition, this Court has rejected the argument that a municipality acts in a proprietary capacity when it imposes a public roads fee, holding that such a fee is revenue for the support of a sovereign government and therefore a tax. Port Orange, 650 So. 2d at 3.[20]

Another critical distinction in Alamo was the finding that "the fee is for Alamo's use of all of the JPA's facilities which benefit Alamo by generating its business. If Alamo wished to avoid the fee, it could obtain its customers from another source." 600 So. 2d at 1162. Here, on the other hand, County rights-of-way are not the source of and do not generate FPL's

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[20] In Port Orange, the appellee and one amicus unsuccessfully argued before this Court that municipalities have proprietary powers over public roads. A.41.20,45,61-65. See also § 125.01(1)(m), Fla. Stat. (counties have power to regulate roads and placement of structures therein); AT&T v. Village of Arlington Heights, 620 N.E.2d 1040, 1044 (Ill. 1993) ("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public."); accord McQuillin § 30.40 ("[T]he estate of the city in its streets ... is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument. ... [Thus,] in supervising the uses of its streets, a municipal corporation is engaged in a function essentially public and governmental."); id. § 30.39 (power "relating to the control of highways and streets, is a sovereign governmental power.").

business. FPL must use public roads to meet its statutory duty to provide a state-regulated public service to its customers, not to obtain customers. The "Privilege Fee" cannot be avoided by not using County roads, and to suggest otherwise is "pure fictionalizing."[21] Furthermore, FPL has a right to place its facilities in public roads as a valid utility and transportation use, subject to reasonable rules and regulations. See supra n. 18 and accompanying text.

Further distinguishing it from the "Privilege Fee," the Alamo fee was "tied exclusively to Alamo's use of the airport," 600 So. 2d at 1162, was charged as a "percentage of the revenues from customers it picks up at JIA," id. at 1164, and "the funds were used only for the airport system." Id. In contrast, the County's "fee" is not based on the extent of FPL's use of County roads, and use of the proceeds is not restricted to the County's road system. Cf. United States v. United States Shoe Corp., 118 S. Ct. 1290 (1998) (maintenance charge of percentage of cargo value held a tax rather than user fee because it did not fairly match use of port services and facilities).

E. The "Privilege Fee" Is Not a Valid Rental Charge

Despite its alleged Alamo roots, the Alachua "fee" was supported below and is supported here by two cases from the turn of the century -- City of Pensacola v. Southern Bell Tel. Co., 49

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[21] See City of Tampa v. Birdsong Motors, 261 So. 2d 1, 7 (Fla. 1972) (rejecting argument that license tax was not sales tax because it is not payable unless merchant continues to do business).

Fla. 161, 37 So. 820 (1905), and City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893), reh'g denied, 149 U.S. 465 (1893). However, these are regulatory fee cases. Both cases upheld a small per pole annual charge on utility poles located in municipal roads as a reasonable regulatory fee pursuant to the cities' power to regulate the use of roads. Pensacola, 37 So. at 823-24. The County would adopt this result but not the reasoning, for it concedes that its "fee" does not meet the requirements of a valid regulatory fee. It scrambles unsuccessfully to distinguish its "fee" from a regulatory fee to avoid the force of those requirements.[22]

Nor is the "Privilege Fee" a reasonable rental charge. A "fee" that admittedly is not based on the extent of use of County rights-of-way, does not vary with the extent of such use, does not take into account identical use by other users of the same rights-of-way, and is not related to any value or costs associated with such use, cannot be in the nature of a rental charge. As found below, "the county concedes that it has no knowledge as to what the rental value of its rights-of-way might be," and its "fee" "bears no discernible relationship to the value of the property actually occupied ...." A.1.7.

As a "non-regulatory, purely revenue-producing measure," the "Privilege Fee" is neither a valid regulatory fee nor a

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[22] For example, the County recognizes that "regulatory fees cannot exceed the cost of the regulation and must be used for the purpose for which they are imposed." Br. at 16. Even assuming arguendo that the "Privilege Fee" has a regulatory purpose, which it does not, it violates both of these requirements.

reasonable rental charge, but a tax. Tamiami Trail Tours, 120 So. 2d at 173.

II. THE ARGUMENTS OF APPELLANT AND SUPPORTING AMICI IGNORE AND ARE CONTRADICTED BY THE RECORD, AND MISCHARACTERIZE THE "PRIVILEGE FEE," THE JUDGMENT BELOW AND FLORIDA LAW

In its memoranda below, the County did not even mention Port Orange, the single most instructive and controlling legal precedent in this case. On appeal, Port Orange is elevated to a footnote to support the County's absurd argument that the circuit court erred by analyzing the purpose and use of the "Privilege Fee."[23] Such analysis is required by Port Orange, but regarded as irrelevant by the County. Br. at 17. The County also argues that the circuit court erred by considering the amount and method of calculation of the "Privilege Fee." Id. at 10, 25-27, 34-36. However, the purpose, use, amount and method of calculation are the distinguishing characteristics of any governmentally imposed charge and must be analyzed to determine its validity. Avoiding this inevitable analysis has required the County to ignore and contradict undisputed facts in the record, and mischaracterize the "Privilege Fee" and Florida law.

The County is left with the artifice that to impose the "Privilege Fee" it need only declare by ordinance that the "fee" is something other than what common sense, elementary logic,

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[23] The County, though, is pleased to embrace Alamo, which also analyzes purpose and use. Br. at 21-22.

Florida law and, perhaps most importantly, the record, including the County's own resolutions and other admissions, unequivocally prove that it is. The County replaces factual findings, legislative staff work and legitimate analysis with wholly unsubstantiated pronouncements, "finding" or "declaring" that: (1) the purposes of the "Privilege Fee" are compensation/rent and payment of regulatory costs for the use and occupation of County rights-of-way, Ord. 97-12, A.2.4,8(§§1.01,1.02(G)); (2) "Electric Utility use and occupancy of the County Rights-of-Way ... provides a benefit ... which is not available to the general public and which inevitably results in the relinquishment of property rights in the County Rights-of-Way, held by the County as a public trust," A.2.7(§1.02(C)); and (3) the "Privilege Fee" is the functional equivalent of a franchise fee and the amount of the "fee" is "reasonable and consistent in amount and within the method of calculation historically bargained for by electric utilities in securing a franchise from local governments," A.2.13-14(§§2.05(D),2.06). However, as this Court has held:

> it is well recognized that findings of fact made by the legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. Moreover, [legislative] findings ... do not carry with them a presumption of correctness if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice.

Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235, 236

(Fla. 1951).

Here, the relied-upon "findings" and "declarations" are not actual findings of fact by the County Commission, which never attempted to "find" facts or to examine the unfounded assumptions behind the "Privilege Fee."[24] They are mere buzzwords, crafted by the County's special counsel to create the appearance of authenticity and binding impact, in anticipation of litigation.[25] Furthermore, these "findings" and "declarations" continually clash with the realities established in the record.

A. The "Privilege Fee" Is Not Compensation/Rent Or Payment Of Regulatory Costs For The Use Of Rights-Of-Way

The County concedes in its resolutions, its own Commissioners and designated representatives have testified, and the circuit court has found that the purpose of the "Privilege Fee" is to broaden and diversify the County's tax base and raise general revenues for the support of County government by imposing a fee on electric utility customers.[26] This will allow the

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[24] As conclusively proven by deposition testimony of all County Commissioners and other specifically designated County representatives, the County made no effort to identify and present to the Commission any factual bases for these so-called "findings" and "declarations," nor were any factual bases considered by the Commission. See supra nn. 8, 11-12 and accompanying text.

[25] A.50,51. It is remarkable that the authors of these fictions urge this Court to pay "deference" to their inventions, as if they really had some legislative basis. Counsel greatly misapprehend their legitimate role when they seek to have their words replace the functions of duly elected officials.

[26] Even in this appeal, the County refers to the "Privilege Fee" as a "revenue source" and "revenue charge" designed "to provide county wide property tax relief." Br. at 2, 17.

County to collect revenues from customers constitutionally and statutorily exempt from the County's ad valorem taxes. The "fee" is neither based on nor related to the extent of use of County rights-of-way and therefore cannot be and is not in the nature of compensation or rental for any such use, and the County readily concedes it is not a regulatory fee in spite of language in the ordinance presuming to conclude that it is.

The County mischaracterizes FPL's claims and the circuit court's conclusions as to the amount and method of calculation of the "Privilege Fee." The County would lead this Court to believe that FPL never challenged the reasonableness of the "fee", that the court's "first issue of concern was that the amount of the Privilege Fee did not depend on the "amount of property actually occupied by the electric utility's poles and other facilities," that both FPL and the circuit court would have been satisfied if the "fee" had been based on a per pole basis, and that the circuit court concluded that the "fee" is a tax solely because it is calculated on a percentage basis. Br. at 10, 24-27, 34-36 (emphasis added). These are gross misrepresentations.

First, FPL did challenge the reasonableness of the "fee." A.35(¶¶34-35); A.43(¶¶27-28). Second, the County misquotes the circuit court's language. The court made no reference to the "amount" of property actually occupied by utility facilities. Rather, the court determined that the "fee" "bears no discernible relationship to the value" of such property, in part because "the county concedes that it has no knowledge as to what the rental value of its rights-of-way might be." A.1.7 (emphasis added).

Third, the circuit court did not conclude that the "Privilege Fee" is an unauthorized tax solely because it is calculated on a percentage basis. Indeed, the fact that the "fee" is calculated in that manner is not even mentioned in its findings of fact, discussion or conclusions of law. A.1.4-9.

The circuit court simply and correctly determined that a case (Pensacola) upholding a "rental" fee based on extent of use, the reasonableness of which was not challenged, does not support a "fee," the reasonableness of which is challenged, that is not based on extent of use and "bears no discernible relationship to the value of the property actually occupied ...." A.1.6-7. The County's assumption that a per pole charge would have satisfied FPL and the circuit court, Br. at 35, is incorrect. Any charge, including a per pole charge, unilaterally imposed for utility use of rights-of-way would have to survive scrutiny under every requirement for valid regulatory and user fees under Florida law.

B. The County Gives Up Nothing In Exchange for Its "Fee"

The County admitted below that no reported decision expressly discusses an "electric utility privilege fee." Reversing fields, its primary argument on appeal is that the circuit court erred by failing to recognize its "fee" as some sort of customary "local government charge imposed for the relinquishment of specific property rights." Br. at 9, 15-19, 23, 25, 29-31, 35-36, 41. Although the County discusses such charges as if they are a recognized category of impositions, not one of its cases stands for this proposition. With its trademark

inventiveness, the County speculates, without authority, that "the reason for the scarcity of such decisions is that, in most cases, these rental charges are consented to by the feepayer and are thus never the subject of judicial review." Id. at 18.

This Court need not embrace such speculation or determine whether such charges are valid in this State in this case because no property rights are relinquished by the County in exchange for the "Privilege Fee." See supra p. 10; see also Br. at 9, 29 (admitting that "Privilege Fee" differs from franchise fee in that "the electric utility does not bargain for any vested rights in the County Rights-of-Way, in exchange for which it consents to pay a fee"). Furthermore, no case cited by the County applies such a theory to a unilaterally imposed charge with the unique characteristics of the "Privilege Fee." The County's willing reliance on inapposite authority -- like the "findings" and "declarations" of the ordinance itself -- is intended to obscure rather than illuminate what the County attempts with its tax.

The County creates an artificial distinction to support its position. It proposes that charges for the relinquishment of property rights in public property, pursuant to proprietary powers, are supposedly rental in nature and unrestricted as to purpose and use. It would distinguish these from "regulatory fees" or fees "to fund a governmental service" (more accurately referred to as user fees), which are exercises "of the police power or the legislative power to fund essential services." Br. at 9, 15-17. These purported distinctions make no sense and find no support in Florida law. Local governments hold public roads

in trust for the public in their governmental, not proprietary capacity, and do not relinquish specific property rights in public roads to private persons.[27] And while regulatory fees are derived from police powers, user fees are derived from proprietary powers. Thus, the County's purported distinctions incorrectly mix and match fees and powers to such a degree that they are useful only to demonstrate the lengths to which the County will go to salvage the "Privilege Fee" from its well deserved invalidation below.

As authority for its "relinquishment" argument, the County relies primarily on Pensacola, St. Louis and Alamo, and to a lesser extent, Plant City. Yet these cases emphatically disprove these very arguments. Contrary to the County's brief (Br. at 20), the Pensacola ordinance did not refer to the $2 per pole charge as "rent."[28] While characterized as being in the nature of a rental, that charge was a regulatory fee derived from the city's power and duty to regulate the use of its public roads:

> [M]unicipalities which have the power and are charged with the duty of regulating the use of their streets

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[27] See supra n.20; Lloyd Enters., Inc. v. Department of Revenue, 651 So. 2d 735 (Fla. 5th DCA 1995) (regulatory fee for public beach concessions created no rental, lease or license for use of real property); Lodestar Tower N. Palm Bch., Inc. v. Palm Bch. Television Broadcasting, Inc., 665 So. 2d 368, 370 (Fla. 4th DCA 1996) (licenses do not convey property rights); McQuillin § 30.43 ("Power to control and regulate a street does not include power to lease [it] for a private use ...."); cf. § 125.42, Fla. Stat. (authorizing counties to grant licenses for public utility use of public roads).

[28] "It will be noted that the word 'rent' does not occur in the ordinance." 37 So. at 823.

> 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 governmental supervision, the latter being a police regulation.

37 So. at 823. The County creates from this language two different fees and powers: a rental fee for the relinquishment or transfer of property rights derived from proprietary powers and a regulatory fee derived from police powers. Br. at 18-19, 30. No such split occurs in the case.

First, relinquishment of property rights is not mentioned in Pensacola. The charge was imposed for use, not relinquishment. Second, other language in the opinion vitiates the County's musings. As a predicate for the above-excerpted language, the Court rejected an argument that a similar ordinance in St. Louis was sustained by the U.S. Supreme Court "on the ground that the city ... was an 'imperium in imperio,' and exercised ownership and sovereign power over its streets." Pensacola, 37 So. at 823. Rejecting that excessive view, the Court determined that "[i]n our construction of this opinion, while it is true, under its charter, the city ... is the owner of its streets, still the court derived the power of the city to enact the ordinance from the power to 'regulate' the use of the streets." Id.[29] And in

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[29] This dispels the mistaken belief that a fee interest in public roads -- which is not established by the record or by the County's incomplete quotation of section 334.03(22), Florida Statutes, Br. at 22 n.15 -- equates to a proprietary interest and proprietary powers in such roads. See also Arlington Heights, 620 N.E.2d at 1045 (statute allowing municipalities to collect compensation for use of roads "purely regulatory in nature").

succeeding language, the Pensacola Court reiterated that "[t]he construction given ... to the ordinance ... will align it under the power to impose a charge for the use and occupation of the streets ... embraced in the power given the city to regulate its streets." Id. at 824. Thus, both Pensacola and St. Louis reject the County's hybrid justification.

The County's reliance on Alamo for its "relinquishment" theory suffers the same fate. No property rights were relinquished in Alamo and the user fees were not rental fees for rights-of-way. Indeed, such terms are not mentioned. Yet the County cites these cases as "clear Florida precedent" recognizing a "distinction in the requirements for a ... fee charged for the relinquishment or transfer of property rights from the requirements for a ... fee imposed under the police power" (a regulatory fee) "or pursuant to the exercise of legislative power to fund essential services" (presumably user fees), and "confirming the unilateral power of a local government to charge a rental for the relinquishment of property interests." Br. at 18-19.

The County's last case is Plant City, which it mischaracterizes as a case "upholding the constitutionality of franchise fees ... in the context of a challenge to the [PSC's] requirement that rental charges be directly billed to the electric customer." Br. at 18, 30. Constitutionality of franchise fees was not an issue and "rental charges" are not mentioned.

The issue in Plant City was the propriety of PSC orders changing its treatment of franchise fees from general operating expenses to itemized surcharges payable only by residents within

the affected municipality. In the context of this issue, this Court held that franchise fees payable pursuant to previously negotiated franchise agreements were not taxes: "[t]he cities would lack lawful authority to impose taxes of this type and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities." 337 So. 2d at 973. The only relinquishment of property rights was the granting of the franchises, not any conveyance of property rights in public roads. Moreover, even assuming arguendo that the property rights relinquished in Plant City were in the public roads, the absence of any such relinquishment here as a bargained-for exchange still renders the "Privilege Fee" a tax under Plant City.

C. The "Privilege Fee" Does Not Grant A Franchise

Based on its review of "extensive evidence" in the record and this Court's decision in Plant City, the circuit court determined that "contrary to the County's assertion and the 'legislative declaration' within the Ordinance itself, the Privilege Fee is not the 'functional equivalent' of a franchise fee and cannot be analyzed as such for the purposes of determining whether or not it constitutes a tax." A.1.1,8-9. This determination is supported by the undisputed record evidence establishing numerous fundamental differences between franchise fees and the "Privilege Fee," and virtually no similarities. Id.; supra pp. 13-15. The County's blind insistence that "the Privilege Fee is what we say it is no matter what the facts," is an attempt to conceal its taxing power with semantics, contrary

to Florida law. See Port Orange, 650 So. 2d at 3; Alachua County v. Adams, 702 So. 2d 1253, 1254 (Fla. 1997).

The County would ignore what it cannot explain. It admits, for example, that franchise fees, unlike the "Privilege Fee," are bargained for and agreed to in exchange for vested rights for a term of years. Br. at 9, 27, 29. These admitted differences -- while not the only ones -- are all that are necessary to void any comparison between the two fees. Plant City, 337 So. 2d at 973. The County, however, says these differences are "irrelevant" to the validity of the "Privilege Fee," arguing that "lack of consent by the Electric Utilities cannot transform an otherwise valid fee into a tax." Br. at 9-10, 28-31 (emphasis added). This circular reasoning assumes the validity of the very fee whose validity is at issue, and ignores Plant City's holding that but for the very characteristics of franchise fees declared irrelevant by the County, they are taxes which "cities would lack lawful authority to impose." 337 So. 2d at 973.[30]

The fundamental component -- and fatal flaw -- of the County's theory is the insupportable misstatement that franchise fees are paid merely for the use of public rights-of-way. Br. at 27-30. That has been amply demonstrated to be untrue, for FPL's franchise fees are paid for all of the vested rights contained in its franchise agreements, the most essential of which is the local government's long-term non-compete agreement. While these

[30] Thus, the County's suggestion that the circuit court's judgment would require a constitutional amendment requiring utilities' consent to taxes is patently absurd. Br. at 30-31.

contracts recognize FPL's right to place its facilities in rights-of-way, the franchise fee is not based on any costs, value or return associated with such use. This, of course, comports fully with Florida law, which recognizes the differences between true franchise agreements and government regulation of utility use of public rights-of-way. Supra pp. 22-26.

Furthermore, the County simply dismisses the dispositive fact that, regardless of whether the fees paid under any given franchise agreement constitute payment for use of rights-of-way, consideration for an agreement not to compete, some combination of these or something else, they are still bargained for and agreed to contractually in exchange for the grant of a franchise, which distinguishes them, factually and legally, from the "Privilege Fee." This is certainly true for all of the franchise cases[31] cited by the County as authority for its argument that franchise fees are right-of-way use fees.

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[31] Throughout its brief (see, e.g., Br. at 18, 20, 26 & 30), the County improperly blends franchise cases such as Plant City and Santa Rosa with regulatory fee or user fee cases such as Pensacola, St. Louis and Alamo without any recognition that the factual and legal frameworks for such cases are vastly different from each other and from the instant case. For example, after discussing Pensacola and St. Louis, which involve regulatory charges for the use of right-of-way but no franchises, the County footnotes to two franchise cases from other jurisdictions for the proposition that "[o]ther jurisdictions also recognize that franchise fees are imposed as rent for using public rights-of-way." Br. at 20 n.14. These two cases -- City of Dallas v. FCC, 118 F.3d 393 (5th Cir. 1997) and City of Little Rock v. AT&T, 888 S.W.2d 290 (Ark. 1994), involve cable television and telecommunication franchises, respectively, granted under statutory and regulatory schemes that have no application to the facts and law of the instant case.

For example, the County relies upon the Santa Rosa opinion for authority that counties may impose franchise fees for using county rights-of-way. Br. at 27-28. A fair reading of Santa Rosa shows otherwise. First, the so-called "imposition" of franchise fees was pursuant to bargained-for franchise agreements. 635 So. 2d at 98, 100 (county ordinance "granted a non-exclusive franchise ... and imposed a franchise fee" pursuant to "the authority of the counties to grant franchises ...."). Second, the fact that the franchise agreements in Santa Rosa permitted the franchisees to use county rights-of-way does not mean the counties could unilaterally impose the same fees for right-of-way use without the agreements.[32] To the contrary, the court held that the franchise fees in that case -- even when viewed as consideration for right-of-way use -- were not taxes because they were contractual. Id. at 103 (citing Plant City and Hialeah Gardens).[33] Third, the determinative holding in Santa Rosa was that, even assuming the franchise ordinances in question to be valid, the utilities' unilateral termination of their franchises agreements based on the failure of certain conditions therein was lawful. See id. Thus, even assuming arguendo that the "Privilege Fee" is a right-of-way use fee, which it is not, its unilateral imposition without a franchise agreement renders

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[32] Any such holding would conflict with Florida Cities, 446 So. 2d at 1112-14, and Oviedo, 704 So. 2d at 207-08.

[33] "We therefore conclude that the trial court erred in characterizing the franchise fees at bar, which constituted consideration for the contractual grant of the right to use county rights-of-way, as taxes." Id. at 103 (emphasis added).

it a tax under Plant City *and* Santa Rosa.

Clinging to the sinking premise that the circuit court invalidated the "Privilege Fee" solely because it was calculated on a percentage basis, Br. at 25-26, the County devotes an entire section of its brief to the reasonableness of its "fee." The argument is as invalid as the "fee."

The County defends its arbitrary "fee" amount by resorting inevitably to the distinctly different franchise agreement. That is, its "fee" can be "imposed" on a percentage-of-revenues basis because that is how franchise fees are "imposed." Id. at 32. That assumes an identity between the two that does not exist.

As with any comparison of apples to oranges, the County's effort provides no support for its tax. The County argues that none of the franchise agreements it refers to "bases the franchise fee on the extent of actual physical use" and that "in none of the decisions approving consistent franchise fee amounts do the courts require a nexus between the amount of the fee and the extent of public property use." Br. at 33, 36. First of all, courts do not "approve" franchise fee amounts. The fees are negotiated. This is demonstrated by Santa Rosa, where the trial court concluded that franchise fees were taxes due to a lack of evidence that the fees were based upon a reasonable right-of-way rental value. 635 So. 2d at 103. The First District reversed on the authority of Plant City that franchise fees are not taxes but are contractual -- not because a "privilege fee" need not be based on extent of use, as suggested by the County. Br. at 26.

More importantly, the franchise fees in Santa Rosa are not

based on the extent of right-of-way use, and no cases require such a nexus, because the use of rights-of-way is not the distinguishing characteristic of franchise agreements, and franchise fees are not negotiated, calculated or paid on the basis of any costs or value associated with such use. Thus, in trying to prove that the "Privilege Fee" is a reasonable fee for use of rights-of-way, the County has demonstrated that it is not a right-of-way use fee at all.

The County continues its retreat from the record and the law with this factually bankrupt assertion:

> The underlying assumption [of franchise agreements] is that once an electric utility engages in the retail sale of electricity within a jurisdiction by exercising a privileged use of public property, the amount of gross revenue from the retail sale of electricity is an appropriate measure of the extent of right-of-way usage or its value as a business expense of the electric utility.

Br. at 36. What is particularly disturbing -- and significant -- about these endless, unsubstantiated assumptions is that not only is the record bereft of factual support, but the County never, in any way, attempted to build a record on any of these issues below. The County is trying to "write around" the decision below by "creating" a new record on appeal. All of the relevant facts and law show that right-of-way use is not the essential purpose of a franchise, not the purpose for which franchise fees are paid, and not the basis on which such fees are calculated.

In similar fashion, the County argues, with no record support, that the percentage-of-revenue method of calculating franchise fees "is almost universally applied" because it was

"predestined" by PSC customer billing requirements. Br. at 37. These rules do not regulate the amount or calculation method of franchise fees, which are invariably negotiated by the franchisor and franchisee. Fla. Admin. Code R. 25-6.100(7) expressly states: "This subsection only specifies the method of collection of a franchise fee," which must be limited to customers within the jurisdiction. A.36.26-27 (emphasis added).

The County's argument that "[t]here is no practical method to equate the number of discrete electric poles or other electric facilities with individual electric customer bills," Br. at 37, is meaningless. Franchise fees are not calculated on a per pole basis, so there is no need to speculate how such a hypothetical franchise fee would be collected. Nor, it must be emphasized, did the County produce a shred of proof that no practical method exists. The County's troublesome view that "it's so because we say it's so" has broadened from its ordinance to its brief.[34]

In its last argument, the County attempts to justify the

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[34] Apparently recognizing that the per pole regulatory fee in Pensacola undermines its argument, the County again turns to its misplaced PSC argument. The County argues that per pole charges were doable in 1905 because "public utilities were unregulated and the per pole charge ... was simply another business expense of the utility," whereas "modern concepts of rate regulation and direct customer billing dictate a percentage of gross revenues as the method of calculating" "fees paid as a reasonable rental for electric utility use of public rights-of-way." Br. at 37. Once again, the County draws meaningless and inaccurate distinctions. The utilities in Pensacola were regulated by the city, which imposed a per pole charge pursuant to its regulatory powers. Neither this case nor the PSC billing collection rules have anything to do with the fee calculation method agreed to in bargained-for franchise agreements.

ordinance's provisions making the "Privilege Fee" a debt of the electric customers and providing for the collection of that debt by the utilities. The County argues that it was "compelled" to treat its "Privilege Fee" in this manner because "the decision to pass through the Privilege Fee has been preempted to the [PSC]." Br. at 38-40. This argument fails by its own force and confirms yet another basis for the unconstitutionality of Ordinance 97-12. If the PSC has exclusive jurisdiction to decide how the "Privilege Fee" (or any other charge) should be collected from customers as part of its rate-setting function, Plant City, 337 So. 2d at 974 n.22 & accompanying text, this entire subject matter is preempted to the PSC and the County has no authority to act in this area. Florida Power Corp. v. Seminole County, 579 So. 2d 105, 107 (Fla. 1991). Secondly, the cited PSC rule pertains to franchise fees, which the County's "fee" is not.

D. The Amici Briefs Offer No Valid Basis For Reversal

The brief of Amici Curiae Florida Association of Counties and Florida Association of County Attorneys adds nothing to the County's arguments and suffers from all the same flaws. It ignores Port Orange, mischaracterizes the Alamo user fee as a rental fee and a franchise fee, and inaccurately states that Plant City, Rosalind and Alamo "approved" a six percent franchise fee. Assoc. Br. at 3-6. It repeats the County's mantra that the "Privilege Fee" is the functional equivalent of a franchise fee, yet admits that franchise fees are part of contractual provisions

in franchise agreements. Id. at 5.[35] It also repeats the non sequitur that because the County chose to mischaracterize its tax as the functional equivalent of a franchise fee, the circuit court's recognition that franchise fees are contractual means that electric utilities can veto any fee or tax. Id. at 8-9.

Significantly, however, these amici admit that the per pole charge in Pensacola "was an exercise of the city's duty to regulate its streets." Id. at 3(emphasis added). They also admit that electric utilities serve as the billing and collection agent for the "Privilege Fee" paid by the customer. Id. at 9.

Amicus City of Altamonte Springs raises numerous factual, legal and conceptual issues that are demonstrably outside of and

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[35] In footnote two of their brief, these amici incorrectly argue that franchise agreements can be unilaterally imposed. The two cases cited -- Telesat Cablevision, Inc. v. City of Riviera Bch., 773 F. Supp. 383 (S.D. Fla. 1991) and Berea College Util. v. City of Berea, 691 S.W.2d 235 (Ky. Ct. App. 1985) -- involve vastly different facts, laws and issues than the instant case. Telesat upheld a cable television franchise ordinance enacted under a statutory framework created by Congress and the State of Florida specifically tailored to the regulation of cable television operators as a distinct class, 773 F. Supp. at 385, 391 and 414, which included a unique statutory definition of "franchise." Id. at 388 n.3. Berea upheld the validity of minimum bid requirements in franchise ordinances pursuant to detailed constitutional and statutory provisions for the granting of franchises in Kentucky. 691 S.W.2d at 235-36. Neither case held that franchises can be unilaterally imposed. In fact, both holdings were premised on the contractual nature of franchises. Telesat, 773 F. Supp. at 409 ("Since a franchise is a contract, the regulatory authority has the right to determine with whom it will contract"); Berea, 691 S.W.2d at 237 (franchise fees are not taxes because they are contractual). Florida law holds that local governments cannot unilaterally impose franchise fees as a condition for utility use of rights-of-way. See Florida Cities, 446 So. 2d at 1112-14; Oviedo, 704 So. 2d at 207-08.

contradicted by the record and which involve matters neither before this Court nor the circuit court. It even argues factual matters contrary to findings of fact by the circuit court that are not disputed here. Therefore, its brief is not a legitimate amicus brief and should be given no weight. See Dade County v. Eastern Air Lines, Inc., 212 So. 2d 7, 8 (Fla. 1968) (striking amicus brief for interjecting non-record matters); Acton v. Ft. Laud. Hosp., 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982)(amici lack "standing to raise issues not available to the parties, nor may they inject issues not raised by the parties"); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. 4th DCA 1996) ("amicus briefs should not argue the facts in issue").

In the course of trying to influence the Court with matters not properly before it, Altamonte makes numerous arguments that have no application here and are just plain wrong.[36] They beg

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[36] For example, Altamonte inaccurately asserts that franchises are issued pursuant to a local government's proprietary powers. See supra n. 16 and accompanying text. Altamonte also inaccurately asserts that local governments possess proprietary powers over their public roads. See supra n. 20 and accompanying text. In the process, Altamonte misplaces reliance on several authorities. Section 337.27, Florida Statutes, merely grants the Florida Department of Transportation authority to condemn more land than it would otherwise need if it will save acquisition costs (total takings may avoid business damages due for partial takings). Section 337.29, Florida Statutes, applies to a statute that has been repealed and does not grant or recognize any specific authority of municipalities. Recent amendments to section 337.401, Florida Statutes, make it perfectly clear that subsection (3) of that statute pertains to "rights-of-way permit fees" under subsections (1) and (2), which are regulatory fees, and that "[e]xcept as expressly allowed or authorized by general law and except for [such permit fees], a municipality may not levy on a telecommunications company a tax, fee, or other charge for operating as a telecommunications

the question of whether the "Privilege Fee" is a valid fee or a tax. They ignore factual and legal differences among regulatory fees, user fees and franchise fees, treating such fees, and cases involving them, as if they are interchangeable, when they are not. Altamonte's arguments focus on telecommunications law, cable television law and cases from other jurisdictions, all of which are framed by federal and state statutes and regulations, facts, policies, practices and customs that differ greatly from, and are contrary to, the facts and law applicable to electric utilities in this case. These distinctions notwithstanding, Altamonte does not cite to a single authority which allows unilateral imposition of a "Privilege Fee" such as the one here.

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company ... or which is in any way related to using roads or rights-of-way." § 337.401(5), 1998 Fla. Session L. Serv. Ch. 98-147, § 1, at 711.

Finally, Altamonte's suggestion that FPL may avoid "franchise fees" by removing its facilities to private property paralleling public roads is contrary to the established facts of this case, Florida law and public policy. The undisputed evidence below is that FPL cannot avoid use of County roads in meeting its statutory duty to provide service to its customers. Moreover, the fact that FPL possesses the power of eminent domain does not eliminate its right to use public roads for the public purpose of providing electric service to the public, subject only to reasonable regulation of such use by local governments. To the contrary, the statute granting eminent domain powers to FPL to condemn public and private property only provides for compensation to private owners. § 361.01, Fla. Stat. The responsibility and discretion to select power line routes belong to FPL, not local governments. See Canal Authority v. Miller, 243 So. 2d 131, 133 (Fla. 1970). Requiring relocation of FPL's facilities in public roads would impact countless property owners at enormous cost and interfere with FPL's statutory duties and the PSC's exclusive jurisdiction to regulate rates and service for the protection of the public welfare. See generally Ch. 366, Fla. Stat.; Seminole County, 579 So. 2d at 106-08.

Indeed, Altamonte eviscerates its entire argument when it hypocritically concludes that counties have no authority to impose the "Privilege Fee" against municipal utilities such as those operated by Altamonte.[37] A.S. Br. at 21-24.

CONCLUSION

For the foregoing reasons, intervenor Florida Power & Light Company respectfully requests that this Court affirm the Final Summary Judgment of the circuit court.

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[37] Altamonte offers no credible reason for its hypocrisy, citing only section 125.42, Florida Statutes, which authorizes counties to grant licenses to utilities for use of public roads in unincorporated areas. If this statute limits counties' home rule authority as argued by Altamonte, it also prevents counties from imposing the "Privilege Fee" because licenses do not convey property rights, Lodestar, 665 So. 2d at 370, and license fees exacted solely for revenue purposes are taxes. Tamiami Trail Tours, 120 So. 2d at 173.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Appellee Florida Power & Light Company has been furnished by U.S. mail to all persons on the attached service list, this 31st day of August, 1998.

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